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WISCONSIN REPORTS

129

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

JUNE 21 — NOVEMBER 7, 1906

FREDERIC K. CONOVER
OFFICIAL REPORTER

CHICAGO
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1907

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OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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ROUJET D. MARSHALL
JOSHUA ERIC DODGE
ROBERT G. SIEBECKER
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Attorney General - L. M. STURDEVANT

Clerk - - - CLARENCE KELLOGG

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ERRATA.

VOL. 124.

Page 539, line 2. For *Kruse*, read *Koelzer*.

VOL. 129.

Page 347, line 14. For *ante*, p. 82, read 128 Wis. 82.

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IN MEMORIAM.

CHARLES E. DYER.

On the 20th day of June, 1906, Mr. F. C. Winkler of Milwaukee addressed the court as follows:

May it please the Court:—The undersigned, appointed by the State Bar Association for that purpose, beg leave to present to your Honors for record in this court a brief memorial of the character and career of the late CHARLES E. DYER.

The Honorable CHARLES E. DYER has borne a distinguished part in the life of this state. Born in Onondaga county, New York, on the 5th day of October, 1834, his early boyhood days were spent in Racine county in this state. Here he received the rudiments of education, partly in the crude schools of that early day, more largely under the wise guidance of his father, an accomplished physician.

At the age of fifteen he left home to learn the printer's trade in Chicago. For nearly two years he served as printer's devil, compositor, paper carrier, and newswriter. He returned home and in the fall of 1851 removed to Sandusky, Ohio, entering the office of a family friend who was clerk of the court of common pleas. In this city he studied his profession and was admitted to the bar in 1857. He had long since formed a habit of persistent self-culture, of extensive reading as well as close study, so that without the advantage of systematic or collegiate instruction his mind became enriched with useful knowledge, and he acquired a strong taste for the choicest in literature. This held him through life. He was always a great reader, discriminating in his selections, and greatly enjoying what he read.

He commenced practice in Sandusky, but early in 1859, attracted towards the home of his boyhood, came to Racine in this state, where he took up his residence. He at once entered upon his professional work. His great industry, legal acumen, grace of presentation, and genial manners won friends and clients. He served as city attorney in 1859 and 1860, was a member of the Assembly in 1867 and 1868, being chairman of the judiciary committee at the latter session. In 1864 he formed a partnership with Henry T. Fuller, and the firm of Fuller & Dyer stood in the front rank in the profession. The late

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Matthew H. Carpenter, then United States senator, who always appreciated a good lawyer, was an admirer and affectionate friend of "CHARLEY DYER," and, when a vacancy occurred in the United States district judgeship for the eastern district of Wisconsin, strongly desired to recommend him for the place. The position was as ill paid as it was important and honorable. Judge DYER yielded to the importunity of his friend and was commissioned judge of that court February 10, 1875. He devoted himself with all his industry, fidelity, and rare ability to his judicial duties. That court has not had a more important era in its history than the thirteen years during which Judge DYER was its chief. The bankrupt law of 1867 was in force. The whisky-fraud prosecutions broke out. Litigation was heavy in every branch of jurisdiction. There was no appellate tribunal except the supreme court of the United States.

Judge DYER brought to his new duties thorough and accurate learning in the law, a clear, discriminating judgment, and a marked judicial temperament. He was patient and courteous, but never allowed the business of the court to drag. When he took a case under advisement he did it for the purpose of study and gave it that study promptly. He pursued his duties with intense solicitude for right and justice. To him no pains were too great, no investigation was too tedious, to arrive at the correct solution of every case whether large or small. With inexhaustible patience he would examine and re-examine so long as there remained any room for doubt. His course won for him golden opinions from bench and bar.

In May, 1888, Judge DYER was tendered the position of counsel of the Northwestern Mutual Life Insurance Company, and he resigned from the bench to accept that position. This he held to the time of his death, which occurred on the 26th day of November, 1905. The company which he thus served as its law officer for over seventeen years has, through its executive committee, placed on record the following just estimate of his service and his worth:

"The fidelity and conscientiousness, the acumen and sound judgment, and the industrious care which he brought to the discharge of this important and responsible trust could not have been exceeded. He was ever watchful that in his department no harm should come to the company. His deep interest in the company did not confine itself to its material welfare, but was solicitous for its integrity and fair fame. Every vote he gave, every word he spoke in consultation, were moved by the consideration that these above all things must be kept unsullied.

"Judge DYER added to thorough learning in his profession the graces of a refined and generous scholarship. He delighted in literature, he loved his books. His tastes were pure and cultivated and he possessed a marked felicity of expression. These, with a noble generosity of sentiment, interspersed with bright wit, lent an especial charm to all his public utterances.

"The warmth of his nature, his genial companionship for those

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with whom his work was done, are vivid in our memory and difficult of adequate portrayal.

"A highminded and distinguished man, a noble character, the truest of friends, we part with him in deepest sorrow."

Judge DYER is entitled to very high rank in the legal profession. He was rooted in the principles and kept fully abreast with the decisions which make up our jurisprudence. He was an able advocate, a safe adviser, a sound and upright judge. He loved his profession and always took the deepest interest in all that concerned its well-being, its ethics, and the good conduct of its members. He was remarkably happy in addresses which any occasion might call for. Many and many a time when lawyers have gathered together have they been delighted and thrilled by the pathos, the wit, and the exalted sentiment of his speech.

He was a man of warm heart, strong in his friendships, and few men have been held in as deep, affectionate regard by their professional brethren as CHARLES E. DYER.

June 20, 1906.

F. C. WINKLER,
A. A. JACKSON,
CHARLES H. LEE,
GEORGE G. GREENE,
ALFRED L. CARY,
Committee.

On behalf of the court Mr. Justice WINSLOW responded:

In speaking of Judge DYER I speak of one to whom I was bound by the closest ties of affection and gratitude. He was a lawyer in the first rank of the profession at Racine, where I commenced the study of the law in 1872. At this time I was doing copying and in the intervals studying Blackstone as I could, in the office of the county judge of Racine county. I well remember one day early in 1873 Judge DYER was in the county judge's office and became involved in the discussion of some legal proposition with Judge HAND upon which their views differed. I listened with much interest, which Judge DYER noticed, and finally he turned to me with a quizzical smile and said, "Look up the law on that and write an opinion." I was only too glad to be so honored, and I set to work with great industry, ransacking all the law libraries in the city, and reduced my conclusions to the form of a written opinion, which not long after I handed to Judge DYER. I well remember the pleasure I felt when he said after reading it, "That sounds like the opinion of a judge." It was a simple incident. Doubtless it soon passed from Judge DYER's mind, but it has never left mine. From that time I had a very well-defined idea that I could and would be a lawyer. I am not sure but that his words determined my life's work. It was not long after this that he offered me a clerkship in the office of Fuller & Dyer,

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which I very gladly accepted, and then began an intimate acquaintance which ripened into lifelong respect and affection.

It is not my purpose to speak at any length of Judge DYER's legal abilities or of his work at the bar and upon the bench. The memorial fully covers this field in words that are fitting and truthful. Were this otherwise, the record of his opinions and charges to juries while upon the federal bench so conclusively demonstrates the clearness of his mind and the exceptional character of his legal and judicial abilities that words of mine are unnecessary. The record is made. It speaks for itself in no uncertain tones.

I prefer to speak of him now as a man and as a friend. The poet speaks of the "good, great man," and such pre-eminently was Judge DYER. Modest, unassuming, and of simple habits, it was not given to to all to know the peculiar sweetness of his life and character; but to those who knew him well and who were fortunate enough to be received into the inmost circle of his friends there must ever remain the memory of a loyal and tender friendship as rare as it was beautiful.

It is not easy to sum up a man's character in a word or even in a sentence, but perhaps it is not too much to say that loyalty and tenderness were the keynotes of Judge DYER's life. There was a vein of the truest sentiment in his character which he preserved intact through all the trials and labors of a busy life as unalloyed and abundant as it was in early manhood. It is difficult to describe it, nor could it be known or appreciated by all, for his nature was somewhat reserved; but those who were fortunate enough to know him well will readily understand what I mean. It was not simply that he was kind of heart; this indeed he was, and many an act of kindness marked his daily path. But the quality of which I speak was more than this; it included a chivalric loyalty to old and tried friends, and a yearning for that close communion of heart with heart which can only exist where affection is unquestioning and confidence supreme. With such a friend he had no reserve; to such an one he revealed the inmost depths of his poetic nature and ofttimes discussed the great problems of "life and death and the vast forever" with the delightful and reverent frankness of a mind which seeks the truth and the truth alone.

He had "love and light and calm thoughts," and these he shared with his fellowmen and thus made easier the rugged pathway of many a man in whose heart there is now a vacant place never to be filled. What needs to be said more! His life left the world a little wiser, a little better, a little nobler; he lifted the banner a little higher, he placed the mark upon a loftier plane. There is no higher praise, no better eulogy, than this, and with this we may well close the earthly record.

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WILLIAM E. CARTER.

Mr. Charles E. Estabrook of Milwaukee then addressed the court and presented the following memorial adopted by the Milwaukee County Bar Association:

To the Milwaukee County Bar Association: Your committee to prepare a memorial and resolutions upon the death of Hon. WILLIAM E. CARTER beg leave to submit the following:

WILLIAM E. CARTER, a member of the bar of this state for nearly fifty years, died at his home in the city of Milwaukee on the 15th day of August, 1905. He was born near Brighton, Sussex county, England, November 17, 1833, the eldest son of William and Ann Carter, and emigrated with his parents to Lancaster, Wisconsin, in 1850.

He studied law with J. Allen Barber during the years 1855 and 1856, and was admitted to the bar in Lancaster, where he commenced the practice of law and continued in the active work of the profession until his removal to Platteville, Wisconsin, in 1861. At Platteville he entered into partnership in the practice of the law with Stephen O. Paine, under the firm name of Paine & Carter, which firm was one of the prominent legal firms in that part of the state during the life of Mr. Paine. Subsequently Mr. CARTER was associated with his brother George B. Carter, T. L. Cleary, and E. E. Burns in the practice of the law at Platteville.

In 1895 Mr. CARTER removed to Milwaukee and became a member of the firm of Van Dyke, Van Dyke & Carter, which connection continued to the time of his death. He clung closely to the practice of his profession from the time he was admitted to the bar to the end of his life.

It is difficult within the limits of this memorial to present an adequate view of Mr. CARTER'S professional career. We find him before the supreme court as early as the case of *Jones v. Grant County*, decided at the June term, 1861, and reported in 14 Wis. 562; from that time until the present term of the court the Reports attest his industry, his skill, and ability as a lawyer. He was always indefatigable and persevering in mastering the facts and the law in each case intrusted to him; he delighted to follow out the intricacies of the law upon any subject which he investigated. His knowledge became almost encyclopedic, and his briefs a complete exposition of the law applicable to the case in hand. He was a lover of the common law and opposed attempts to meddle with it. His method of work precluded him from efforts of displaying his eloquence. His manner of presentation of his case to the court and to the jury was method-

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ical, logical, and precise. His profound knowledge of law, his great industry and care in preparation, made him an antagonist to be feared, but a safe adviser for the court and client.

While his reputation will largely rest upon his attainments as a lawyer, he did not limit his intellectual work to a mastery of the principles of the law. Without the advantages of scholastic education, he devoted himself to a self-education with so much energy that he became a master of his mother tongue and acquired a reading acquaintance with Greek, Latin, French, Italian, and German. He was a general student, and delighted to spend his leisure hours in his library investigating many branches of science, religion, and general learning outside of his profession.

Early in life he was fond of and became a very expert chess player, and without looking at the board, but depending upon information of the moves of his adversary, was more than able to hold his own with expert players.

He was a man of the strictest integrity; he hated shams and all forms of deceit. With strangers he was reserved, but with his intimate friends he was most genial and companionable. He freely gave his time and labor to their service.

In the treatment of young men studying law he was most considerate. One of your committee commenced the study of law under Mr. CARTER's supervision, and a student never had an instructor more generous of his time and more willing to assist. Always ready to lay aside his own work, Mr. CARTER would at once enter upon an exposition of the question involved that was not only lucid but exhaustive and helpful to the student needing assistance.

In politics he was a Republican, having identified himself with that party at an early day when it was organized under the leadership of great men to work out and preserve this nation, and always has consistently stood for its principles, and his last ballot was cast for the President of the United States who now honors that distinguished office.

During the Civil War, although precluded from active service as a soldier by physical disability, he nevertheless burned with a desire to render all the service he could to his country, and supported the cause of the Union, and served for several months in a clerical position.

In 1877 his party nominated him for attorney general, which nomination he declined. Elected to the Assembly in 1877, 1878, and 1879, he took a prominent part in the work of the legislature, frequently participating in debates, and was of great service in the committee rooms. On many occasions he represented his party in county and state conventions, and was a member of the famous National Republican convention convened in Chicago in June, 1880,

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which finally nominated James A. Garfield for President of the United States.

For many years he was a member of the Board of Regents of the State University and served the public in that capacity with the same zeal he served his clients.

In his family life he was a devoted husband and father.

In his death we have lost a capable and industrious lawyer, an upright citizen, and those who knew him intimately a genial, kind-hearted, and helpful friend.

Resolved, that we mourn his loss, and that this memorial be spread upon the minutes of the court, and that a copy thereof be transmitted to his family, to the members of which we extend our sincere sympathy.

CHARLES E. ESTABROOK,
GEORGE D. VAN DYKE,
JOSHUA STARK.

Mr. Estabrook then said:

May it please the Court:—I am commissioned by the Bar Association of Milwaukee county to present to this court the memorial adopted by that organization commemorative of the life and work of the Hon. WILLIAM E. CARTER, and to ask that this court direct this memorial be spread upon the records of this court.

And now, having discharged this duty, permit me to add a word or two as a personal tribute to the deceased.

It was my privilege to become acquainted with Mr. CARTER while I was still a boy and he was a young man then entering upon a professional career destined to last over half a century. This long acquaintance enabled me to observe how closely he adhered to the practice of his profession. To him severe mental labor seemed to be a joy and a delight. He never shrank from any task along the line of his professional labors, even if it involved learning a language or mastering a work upon science or mathematics. His work as a lawyer was characterized by great industry, intense application, and a thoroughness in everything which he undertook.

It has often been a great surprise to me how much he could accomplish in what might be deemed pure scholarship, when his life was so busy, and when we also consider the very limited opportunity. About six weeks, as I am informed, was the only time afforded him for attendance at school in early life.

I began the study of law in his office, and I cannot allow this occasion to pass without expressing for myself, and I believe for every young man who occupied similar relations to him, our appreciation of the courteous and considerate treatment which we received at his hands. He never was so busy or so much engrossed as to manifest the slightest impatience at our interruptions, and he gave freely and

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cheerfully and unselfishly his time and effort to assist us in our tasks and the accomplishment of our aims.

He died as he had lived, respected and esteemed for his accomplishments, ability, and learning, and sincerely mourned by those who knew him intimately.

Mr. Chief Justice CASSODAY, for the court, responded:

I first made the personal acquaintance of Mr. CARTER as a member of the Assembly in the winter of 1877. He then had the reputation of being one of the leading lawyers in the southwestern portion of the state. For that reason he was made a member of the judiciary committee and chairman of the committee on federal relations. He proved himself to be a faithful, industrious, and useful member of that body. Naturally independent, discriminating, and aggressive, he soon came to be regarded as one of the leaders in the Assembly. His record as a lawyer during that winter was such as to make him a member of the joint committee on the revision of the statutes in the winter of 1878 and chairman of the judiciary committee of the Assembly during the winter of 1879. He also served for several years as a member of the Board of Regents of our State Universit He had an ambition for judicial honors, but was defeated for the office of circuit judge, at the spring election of 1876, by Judge COTHREN, the sitting judge. He was a member of the legislature when the membership of this court was increased from three to five; and he was strenuously urged before the legislative caucus for the place on this bench finally given to the late Justice DAVID TAYLOR. Mr. CARTER was also one of the sixteen Wisconsin delegates in the Chicago convention of 1880 who started the vote for Garfield which resulted in his nomination on the second ballot thereafter. He was a candidate or prominently mentioned for other political offices. Mr. CARTER was a man of extensive reading and knowledge and had very decided convictions on most political and other questions, and he was always ready to defend them on any occasion and against all comers. His bold and defiant manner and his biting sarcasm had a tendency to stimulate a belligerent spirit, not only in his opponents, but also, at times, among the bystanders. To him every lawsuit was a prospective battle and he prepared himself in advance to fight it out and to force victory by superior fighting. In doing so he relied for success more upon his presentation of facts and the force of his logic than embellishments of speech or grace of diction—more upon his power to convince than his power to persuade. But back of his defiant manner was a kind heart and a deep sense of justice which was generally appreciated.

Let the presentation and remarks be entered of record in the court.

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CASES DETERMINED

AT THE

January Term, 1906.

WILBERT, Administratrix, Respondent, vs. SHEBOYGAN LIGHT, POWER & RAILWAY COMPANY, imp., Appellant.

February 27—June 21, 1906.

Electricity: Duty of persons using: Negligence: Failure of lighting company to repair defects: Escape of current to other wires. Liability for injuries, etc.

1. A high degree of watchfulness for the prevention of accidents is imposed upon persons using electric currents, and such watchfulness should take into account the acts of strangers and of the public generally.
2. A wire which had been attached by a stranger to a tree for the purpose of holding it upright was fastened at the other end to a guy post in such a way as to be in contact with the guy wire of an electric light pole. It became charged with a current escaping through a defective insulator from the electric lamp to the span wire and thence to the guy wire, and plaintiff's intestate was killed by coming in contact with the tree wire while it was so charged. Upon the evidence it is *held* that the jury were warranted in finding that these defective conditions had existed for such a length of time that the lighting company ought to have discovered and remedied them before the accident.
3. The existence of the tree wire was not such an extraordinary and unusual condition that it can be said as a matter of law that it was not reasonably to have been apprehended in the conduct of the company's business.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The appellant, the *Sheboygan Light, Power & Railway Company,* is a corporation conducting its business in the city

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of Sheboygan under authority granted it by the city. It maintains the poles, wires, lamps, and station necessary for an electric lighting business. In June, 1902, it maintained a street light at the intersection of North Thirteenth street and Erie avenue. In maintaining this light it had placed one electric light pole at the northeast corner, and another at the southwest corner, of the intersection of these streets. To the tops of the poles was attached the span wire from which the street lamp was suspended. A guy wire was attached to the pole at the southwest corner of this street crossing and was also fastened, about four feet from the ground, to a guy post, placed to the west, between the sidewalk and the gutter. A thin wire had been stretched from this guy post, about four feet from the ground, to a tree, at about nine feet from the ground. The tree was located to the east and near the light pole at the southwest corner of the street crossing. This wire had been placed there by one Mr. Zurheide, who resided on the adjoining premises, for the purpose of holding the tree upright and to prevent its branches from dropping onto a railway gate near the tree. This wire was fastened to the tree by a strap and was wound around the guy post in contact with the guy wire. The street lamp, which was suspended by an interlocking device from the span wire near the center of the street crossing, had a rope attached to it which led to the light post and was used to raise and lower the lamp. When the lamp was completely raised, the only break in the metallic connection from the lamp to the span wire was an insulator of the usual type. This was placed there to prevent the electric current, which fed the lamp, from passing from the lamp to the locking device and thence to the span wire and the other connections forming a conductor for the electric current.

The complaint alleges that the *Sheboygan Light, Power & Railway Company* negligently constructed and maintained its plant at this street crossing, in that it placed the guy post with the guy wire attached too near the ground and in contact with

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the span wire near the top of the light pole, and that it negligently used a defective insulator between the lamp and the span wire, and failed to exercise due care to discover the tree wire, the broken insulator, and the consequent escape of the electric current. It is further alleged that, by reason of such neglect, on the night of June 6, 1902, one Hugo Wilbert, without fault on his part, while lawfully traveling on the street crossing, came in contact with this tree wire, charged with the electric light current, which had passed through the defective insulator and thence to the locking device and the connecting wires, causing his immediate death. This action is brought to recover the damages resulting from his death.

At the conclusion of plaintiff's evidence the defendant the *Sheboygan Light, Power & Railway Company* moved for a nonsuit and also for a direction of a verdict in its favor. Both of the motions were denied. The case was then submitted to the jury upon a special verdict, and they found in effect: (1) That Wilbert was killed by an electric current by coming in contact with the tree wire; (3) that the insulator above the lamp was cracked and defective, permitting the electric current to pass from the lamp through the locking device to the span wire; (4) that the span and guy wires were in close proximity at the top of the light pole; (6) that the electric current passed from the lamp through the defective insulation, then through the locking device and the span, guy, and tree wires, and thence through Wilbert's body to the ground; (7) that this condition of the lamp, wires, and post, and the escaping electricity, made the street insufficient and dangerous at this place; (8, 9) that the defendant, in the exercise of ordinary care, ought to have discovered these defective and dangerous conditions and to have remedied them before Wilbert was killed; (10) that these defects were the proximate cause of his death; (14) that he was free from contributory negligence in coming to his death.

After verdict appellant moved for judgment notwithstand-

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ing the verdict, and, in case of such motion being denied, it moved to change the answers to questions 7 and 8 of the verdict by striking out the answer "Yes" to each of them and by inserting the answer "No," and by striking out the answers to questions 9 and 10. These motions were denied, and judgment was awarded plaintiff upon the verdict as rendered by the jury. This is an appeal from such judgment.

For the appellant there was a brief by *Francis Williams,* attorney, and *W. M. Wherry, Jr.,* and *William Osgood Morgan,* of counsel, and oral argument by *Mr. Williams.* They contended, *inter alia,* that the inference by the jury that it might reasonably have been expected by a man of ordinary intelligence and prudence that a third person would trespass on the property of the defendant railway company, and for his own purposes attach to the company's guy post and loop around the company's guy wire his own trespassing wire, stringing the same to his own shade tree for the support thereof, in such a position as to obstruct the highway in violation of a municipal ordinance, is an inference that the jury should not have been permitted to draw. *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141; *Radmann v. Chicago, M. & St. P. R. Co.* 78 Wis. 22; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 540, 541; *Huber v. La Crosse City R. Co.* 92 Wis. 636; *Kumba v. Gilham,* 103 Wis. 312; *Sharp v. Powell,* L. R. 7 C. P. 253; *Klatt v. Milwaukee,* 53 Wis. 196; *Raymond v. Keseberg,* 91 Wis. 191; *McFarlane v. Sullivan,* 99 Wis. 361; *Doherty v. Waltham,* 4 Gray, 596; *Tutein v. Hurley,* 98 Mass. 211; *Morris v. Brown,* 111 N. Y. 318; *Mars v. Delaware & H. C. Co.* 54 Hun, 625; *Brady v. Shepard,* 42 App. Div. 24; *Malloy v. New York R. E. Asso.* 156 N. Y. 205; *Freeman v. Brooklyn Heights R. Co.* 54 App. Div. 596; *Mire v. East La. R. Co.* 42 La. Ann. 385; *Augusta R. Co. v. Andrews,* 89 Ga. 653.

For the respondent there was a brief by *Simon Gillen* and *E. R. Veech,* and oral argument by *Mr. Gillen.*

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The following opinion was filed April 17, 1906:

SIEBECKER, J. Appellant contends that the evidence is insufficient to support the inference that the negligence complained of was the proximate cause of the injury. The plaintiff's claim respecting the defective and dangerous condition, construction, and maintenance of the light plant is not controverted, but it is asserted that the defendant had no knowledge that the tree wire had been attached to the guy wire and post, or that the lamp insulator by cracking had become defective and unsafe, thus permitting the electric current to escape from the lamp to the span and guy wires and thence to the tree wire. The jury found that these conditions of the plant made the street at the place of accident dangerous to persons using it for the ordinary purposes of travel, and that these dangerous conditions had existed a sufficient length of time before the accident for the defendant, in the exercise of ordinary care and diligence, to have discovered and remedied them. It is not questioned but that these defects and the dangerous condition of the street existed at the time of the accident, as claimed; but it is urged that the proof is insufficient to show that the insulator near the lamp had been out of repair for a sufficient length of time to charge the defendant with negligence in not having discovered it before the accident occurred. There is evidence tending to show that a few hours after the accident tests were made by defendant to ascertain whether the guy wire was charged with an electric current, and that it became so charged when, by raising the lamp to its full height, the locking device of the lamp attached to the span wire interlocked, indicating that the electric current charging the span, guy, and tree wires came from the lamp through the defective insulator immediately above it. There is evidence to the effect that, in the evening before the accident, electric sparks were observed among the tree branches, near the span and guy wires, and at points some distance from the pole,

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along the wires leading to this pole which supported the span and guy wires. Several witnesses testified that they had observed the branches of trees near to and in contact with these wires, and had seen parts of branches lying on the ground below, the ends being burned and charred and some of them having depressions burned into them, indicating contact with heat. It also appears that the voltage of the current was of such high potential that, if it passed to these wires, it would heat them. The time during which this burning was testified to have occurred covered a period of several weeks. The evidence tends to show that there was nothing in the appearance of things to indicate that the defective condition of the insulator may not have existed for a considerable time before the accident. There was no conflict in the proof as to the sparks of electricity among the wires at the pole and the burning of the twigs and branches. In view of the nature of the business and the circumstances of the case, we are of the opinion that the jury were justified in their inference that the defect in the insulation had existed for a sufficient time for the appellant, in the exercise of ordinary care in the conduct of the business, to have discovered and repaired it before the injury happened.

It is also contended that there is no basis for the jury's finding that defendant, in the exercise of reasonable care, ought to have discovered the dangers which caused Wilbert's death, and to have removed them before the accident, upon the ground that the existence of the tree wire was an intervention not within reasonable apprehension in the ordinary course of events. If the existence of the tree wire was not within the field of reasonable apprehension, then appellant's contention is well founded, for it cannot be charged with negligence respecting the existence of a condition not reasonably to be anticipated in the course of events. The question, therefore, is whether, under the facts and circumstances proven, the existence of this tree wire was an intervention such as

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appellant should reasonably have apprehended as likely to exist. To say that a condition is reasonably to be apprehended does not imply that the exact condition proven as to the erection of this tree wire was to have been expressly contemplated, but it implies that a dangerous condition, in the nature of this one, was likely to arise in connection with the conduct of appellant's business. The danger incident to the use of electricity is imminent and lurking in character, and a high degree of watchfulness for the prevention of accidents is imposed on persons handling it. This court, referring to the care required of those handling electricity and the lurking danger to one coming in contact with live wires, stated, in *Nagle v. Hake,* 123 Wis. 256, 101 N. W. 409:

"From the very fact of these known dangers . . . [a person] must necessarily be charged with a higher degree of caution and diligence than one who is dealing with sticks and stones which can convey no such concealed death stroke." *Fitzgerald v. Edison E. I. Co.* 200 Pa. St. 540, 50 Atl. 161; *Mitchell v. Raleigh E. Co.* 129 N. C. 166, 39 S. E. 801.

The watchfulness needed to prevent such accidents should take into account the acts of strangers and the public generally. As above stated, we are of the opinion that the evidence warrants the inference drawn by the jury, that, if appellant had exercised reasonable care and diligence, it would have discovered the defective insulator and that the electric current was escaping to the connecting guy and span wires, and in the performance of this duty it would in all reasonable probability have observed the existence of this tree wire and the dangers incident to it. From this it must follow that the existence of this tree wire was not such an extraordinary and unusual condition that it can be said that, as a matter of law, it was not reasonably to be apprehended in the conduct of appellant's business. Under the circumstances the court properly held that the evidence supported the finding that the defendant, in the exercise of ordinary care, ought to have

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discovered the defects and dangers complained of, and to have removed them before Wilbert's death. The following adjudications have a bearing on this subject: *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 18 N. W. 764; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 11 N. W. 356, 911; *Meyer v. Milwaukee E. R. & L. Co.* 116 Wis. 336, 93 N. W. 6; *Cary v. Preferred Acc. Ins. Co.* 127 Wis. 67, 106 N. W. 1055; *Morey v. Lake Superior T. & T. R. Co.* 125 Wis. 148, 103 N. W. 271; *Gilman v. Noyes,* 57 N. H. 627; *Lane v. Atlantic Works,* 111 Mass. 136; *Lowery v. Manhattan R. Co.* 99 N. Y. 158, 1 N. E. 608; *Jensen v. The Joseph B. Thomas,* 81 Fed. 578; *McCauley v. Norcross,* 155 Mass. 584, 30 N. E. 464.

We are of the opinion that the trial court properly awarded judgment on the special verdict.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied June 21, 1906.

WEST CONCORD MILLING COMPANY, Appellant, vs. HOSMER and another, Respondents.

February 28—June 21, 1906.

Landlord and tenant: Termination of lease by surrender.

Before the expiration of their term lessees of a mill told the lessor that they would have to give up the mill, and he replied that they could do so if they would get a man as good as they were. They said they would try, but paid no rent thereafter, and thereupon surrendered the premises to the lessor, who accepted such surrender and immediately took full and exclusive possession. *Held,* that the lease was thereby terminated and the lessees relieved from further payment of rent.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

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This is an action by the lessor to recover the balance of unpaid rent from the lessees. It appears and is undisputed that July 17, 1902, the plaintiff leased to the defendants the premises described, with all the buildings and appurtenances thereon, for the term of two years from August 15, 1902, with the privilege of buying at the end of the first year for $6,200. The defendants therein agreed to pay to the plaintiff $50 on the 15th day of each month in advance for and during the full term of the lease, with an agreement that, if the defendants failed to pay rent as specified or failed to fulfil any of the covenants therein contained, it should be lawful for the plaintiff to re-enter and take possession of said premises and hold and enjoy the same, without such re-entry working a forfeiture of rents to be paid and the covenants to be performed by the defendants for the full term of the lease. This action was commenced to recover $400, being eight instalments of rent—the first being that of February 15, 1903, and the last that of September 15, 1903,—with interest on each instalment from the day of its default until paid.

The defendants by way of answer admitted the execution of the lease and the default in paying the rent due February 15, 1903, or at any time since, and by way of counterclaim for $500 damages alleged that at the time of making the lease the plaintiff represented to the defendants that the gristmill was in good condition and would do good work, and the defendants, relying upon such representations, made the lease, whereas, as a matter of fact, as the plaintiff then well knew, the elevator pit was improperly constructed and leaked, and became full of water and wet, and spoiled a large quantity of grain and injured and spoiled the flour made therefrom; that by reason of such defects the defendants could not use the mill, and so quit and surrendered possession thereof to the plaintiff, and that the plaintiff accepted such surrender of such premises. The plaintiff replied to the counterclaim by way of a general denial.

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A trial being had, the jury at the close thereof returned a special verdict to the effect (1) that the elevator pit in the mill was so improperly constructed or out of repair that it would leak and fill with water to the extent that the elevator cups would dip water and injure wheat therein; (2) that such defect in the elevator pit was not capable of being ascertained by a reasonably careful and prudent person by the exercise of ordinary care and diligence in inspecting the mill generally; (3) that the defendants in the operation of said mill could not, by using ordinary care and diligence, have prevented the wheat in the elevator pit from becoming wet from water therein; (4) that when the lease in question was made the president of the plaintiff corporation, with whom such contract was negotiated, knew that said elevator pit was defective and in a dangerous condition, so that it would fill with water and injure the wheat therein; (5) that the defendants did sustain damage from wheat becoming wet in the elevator pit in the sum of $232.50; (6) that the defendants, when they paid their rent under the lease on August 14, 1902, and the following months thereafter to February 15, 1903, did have knowledge of the defective condition of the elevator pit (answered by the court); (7) that the defendants did surrender to the plaintiff, and the plaintiff did take full and exclusive possession of, the leased premises, and accept such surrender, except as authorized by the lease; (8) that the plaintiff did take such exclusive possession immediately; (9) that the use of the mill as a mill was materially lessened by reason of such condition, when operated with ordinary care and prudence.

Thereupon the court by order denied the defendants' motion for judgment upon the answers of the jury to questions 5 and 6 in said special verdict, and further ordered that the answer of the jury to question 3 in the special verdict be changed from the negative to the affirmative, so that it found, in effect, that the defendants, in the operation of the mill,

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could by using ordinary care and diligence have prevented the wheat in the elevator pit from becoming wet from the water therein; and further ordered that the answer to question 7 in the special verdict be changed from the affirmative to the negative, so that it found, in effect, that the defendants did not surrender to the plaintiff, and the plaintiff did not take full and exclusive possession of, the leased premises, and accept such surrender, except as authorized by the lease; and it was further ordered that upon the remaining questions, to wit, 1, 2, 4, 8, and 9, of the special verdict, and the uncontradicted evidence, judgment be entered for the defendants, dismissing the action, with costs. Thereupon and on motion of the defendants judgment was entered dismissing the plaintiff's complaint, with $34.90 costs. From that judgment the plaintiff appeals.

Mills Tourtellotte, for the appellant.

C. L. Hood, for the respondents.

The following opinion was filed April 17, 1906:

CASSODAY, C. J. Most of the findings of the jury were in favor of the defendants. They were to the effect that the elevator pit was improperly constructed and leaked; that such defect was known to the plaintiff at the time of making the lease, but was not discoverable by the exercise of ordinary care and diligence in inspecting the mill generally; that the use of the mill was materially lessened by reason of such defect; and that the defendants had sustained damage by reason thereof in the sum of $232.50. But the defendants were not allowed to recover such damages on their counterclaim, because the court found, upon the undisputed facts, that by using ordinary care and diligence in operating the mill the defendants could have prevented the wheat in the elevator pit from becoming wet from the water therein, and that they paid their rent monthly in advance under the lease for each of the first six months of its duration with full knowledge of

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such defective condition of the elevator pit. So the defendants were defeated on their counterclaim, and, since they have not appealed, the controversy as to that, and the ruling of the court thereon, are necessarily eliminated from the case. The important question for determination is whether, upon the facts found by the jury and the undisputed evidence, the court was justified in dismissing the complaint and ordering judgment in favor of the defendants. The defendants claim that they were justified in refusing to pay the seventh instalment of rent, and those subsequently accruing, by reason of the defective condition and leakage of the elevator pit, which materially lessened the use of the mill, and which facts were known to the plaintiff at the time of making the lease, but were unknown to the defendants at that time, and not then discoverable by the exercise of ordinary care and diligence in inspecting the mill generally. In addition to the facts stated it appears and is undisputed, in effect, that a short time after the defendants had paid the instalment of rent due January 15, 1903, and before the next monthly instalment became due, the defendants informed the plaintiff that they would have to give up the mill; that the plaintiff replied that they could do so if they would get a man as good as they were; that the defendants said they would try, but never paid any rent thereafter; and thereupon, and on or about February 15, 1903, the defendants surrendered the leased premises to the plaintiff, and the plaintiff accepted such surrender and immediately took full and exclusive possession thereof, and has retained such possession ever since.

Did such facts relieve the defendants from further payment of rent? In an English case decided by the court of King's Bench long ago, a dispute had arisen between the landlord and tenant, whereupon "the tenant said to the landlord, 'I shall quit,' and the latter said, 'You may do so, and I shall be glad to get rid of you.' " Thereupon the tenant removed her furniture from the premises and sent the keys to the land-

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lord, who accepted them, whereupon the landlord brought *assumpsit* for use and occupation, and it was held that the landlord "could neither recover the rent, which by virtue of the original contract would have become due at the expiration of the current quarter, nor rent *pro rata* for the actual occupation of the premises for any period short of the quarter." *Grimman v. Legge,* 8 B. & C. 324. To the same effect, *Auer v. Penn,* 92 Pa. St. 444. In this last case it was held that "by such acceptance and surrender the relation of landlord and tenant is ended; and the landlord, having taken possession of the premises, either personally or by another tenant, is estopped from collecting rent." This court has held that "if before the expiration of the term the lessee offers to surrender the lease, and the lessor thereupon takes exclusive possession of the premises, this amounts to a surrender and acceptance which terminates the lease." *Kneeland v. Schmidt,* 78 Wis. 345, 47 N. W. 438. To the same effect, *Maxon v. Gates,* 112 Wis. 196, 201, 88 N. W. 54, and cases there cited; *Commercial H. Co. v. Brill,* 123 Wis. 638, 642, 101 N. W. 1101. We must hold that the plaintiff, having accepted such surrender of the leased premises and taken full and exclusive possession thereof, was thereby estopped from collecting rent which otherwise would have accrued under the lease, subsequent to such surrender.

We find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

A motion for a rehearing was denied June 21, 1906.

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GOLDEN and another, Appellants, vs. MEIER and others, Respondents.

March 22—June 21, 1906.

Written contract: Parol evidence of condition precedent to its taking effect.

Parol evidence is admissible to show that a written contract not under seal, though manually delivered, was not to become a binding or valid contract until the performance of some condition precedent, even though the written instrument itself enumerates other conditions precedent to its becoming operative and taking effect, where such written conditions are not repugnant to the one sought to be shown by parol.

APPEAL from a judgment of the circuit court for Pierce county: E. W. HELMS, Circuit Judge. *Affirmed.*

This action was brought to recover damages for breach of the following alleged contract:

"*Know all men by these presents:* That we, the undersigned, whose names are hereto subscribed, all of the county of Pierce and state of Wisconsin, do hereby associate ourselves together as a co-operative association under the name of the Prescott Creamery Association, for the purpose of manufacturing our butter at actual cost. It is agreed that the place of business or creamery plant proposed to be erected shall be located at or near Prescott, Wisconsin. It is further agreed in consideration of the mutual benefits herein agreed by and between the members of said association and whose names are hereto subscribed as parties of the first part, and *Golden* and *Tobias* as parties of the second part, as follows, to wit:

"It is hereby agreed by and between the parties of the first part and the parties of the second part that the parties of the first part shall consist of not less than thirty-three members, whose names shall be subscribed hereto, before this agreement shall become operative and take effect upon either party. The parties of the first part agree to furnish free of charge sufficient land for a suitable location, and reasonably level, on which the creamery building shall be erected, and said

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first party shall also furnish free of charge on the creamery grounds aforesaid a sufficient well of good, pure water. Said ground shall be furnished said second parties on or before the 1st day of April, 1904, so as not to delay the erection of said creamery.

"And it is agreed that the parties of the second part shall build, equip, and complete for said parties of the first part on or before the 1st day of June, 1904, a creamery plant on said location aforesaid, as per plans and specifications and list of machinery and appliances hereto attached, for the consideration of thirty-three hundred dollars, which said sum of thirty-three hundred dollars the parties of the first part hereby covenant and agree to pay said parties of the second part, their heirs or assigns, with interest from June 1, 1904, at six per cent. per annum as follows, to wit: $1,100 January 1, 1905, $1,100 January 1, 1906, $1,100 January 1, 1907.

"It is further agreed that the parties of the first part shall appoint a president and secretary to act as said association's representatives in looking after the erection of said creamery plant and whose duty it shall be to accept said creamery plant for said parties of the first part, upon notice in writing to them by said second parties of the completion of said plant, and should said representatives aforesaid fail to notify said parties of the second part in writing of the acceptance by them of said creamery plant as herein mentioned within six days after the second party gives them notice of the completion of said plant, the same shall stand accepted without any further act."

The complaint sets up the contract and alleges that defendants were copartners and failed to perform on their part, and refused to permit plaintiffs to perform, in consequence of which they sustained $1,225 damages. The answer specifically denies that defendants were partners, and alleges that at the time each defendant affixed his signature to the written agreement it was specially agreed that said agreement was not to become binding or effective for any purpose until the plaintiffs had obtained from the signers of such agreement a pledge in writing to furnish for the use of the creamery when erected the milk from 250 to 350 cows, and that the plaintiffs

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wholly failed to obtain such pledge, and that the defendants signed the instrument relying upon the agreement that such contract would not become effective or of any binding force until the plaintiffs had obtained such pledge, and that it was well understood between plaintiffs and defendants that such creamery could not be run so as to pay expenses with less than the number of cows specified. The answer contained other defenses not necessary to state.

The case was tried by the court and a jury, and a special verdict returned to the effect that at the time the contract was signed and delivered to the plaintiffs by twenty-five of the defendants there was an agreement between them and the plaintiffs that such contract should not become binding upon such defendants until agreements were obtained from various individuals to furnish in the aggregate the product of at least between 250 and 350 cows to the proposed creamery. Motions were made by plaintiffs to set aside the answers to the questions and for judgment notwithstanding the verdict, and the defendants moved for judgment on the verdict. Plaintiffs' motions were denied and defendants' granted, and judgment entered in favor of the defendants and against the plaintiffs, dismissing the complaint, from which this appeal was taken.

Thomas M. Casey, for the appellants.

F. M. White, for the respondents.

The following opinion was filed April 17, 1906:

KERWIN, J. The only question necessary to consider on this appeal is whether evidence was properly admitted to show that it was agreed at the time respondents, or some of them, affixed their signatures to the written agreement that it should not become binding or effective for any purpose until the appellants had obtained from the signers of such agreement a pledge in writing to furnish for the use of the creamery men-

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tioned in the agreement, when erected, the milk from 250 to 350 cows. It is claimed on the part of the appellants that the evidence offered that the agreement signed was not to go into effect until such pledge was obtained was not admissible since the contract in question is complete and contained the provision "that the parties of the first part shall consist of not less than thirty-three members, whose names shall be subscribed hereto, before this agreement shall become operative and take effect upon either party." It is contended that the provision in the written agreement to the effect that it shall not be valid until signed by thirty-three members precludes testimony of any condition precedent to the taking effect of the agreement. Counsel relies wholly upon *United E. & C. Co. v. Broadnax,* 136 Fed. 351, which case he says is the only one he has been able to find passing upon the exact question here. It is true the *Broadnax Case* appears to support the contention of appellants to the effect that, where the written instrument enumerates conditions precedent to its validity, it will be presumed that the written enumerations are exhaustive and that parol evidence to add to them should be excluded. This case, however, appears to be out of harmony with the case of *Ware v. Allen,* 128 U. S. 590, 9 Sup. Ct. 174. Counsel for appellants attempts to distinguish *Ware v. Allen* from the *Broadnax Case.* In *Ware v. Allen* the agreement provided in terms that it should be void if the promisor should be defeated in a certain suit, but in other respects was a valid, binding obligation. Yet it was held that evidence was admissible to show that before the paper was signed it was understood that the agreement was to be of no effect unless, upon consultation with certain parties, the promisor was assured that certain proceedings involved in the transaction were lawful. So it will be seen that this case on principle is in substantial conflict with the *Broadnax Case* and holds that, notwithstanding there were conditions in the contract to the effect

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that it should be valid only upon certain contingencies, still other conditions precedent to its validity might be shown. At page 595 of 128 U. S. (9 Sup. Ct. 176) the court said:

"We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter."

But it is not necessary to consider here the admissibility of evidence to prove a condition precedent wholly repugnant to the expressed terms of the agreement in question, since the evidence offered is not in conflict with such agreement, but is independent of or collateral to it. If the condition precedent be performed according to the terms of the condition sought to be proved by parol, the writing will have full force and effect according to its terms. If the condition precedent be not performed, then the contract will never have vitality or become a binding agreement. If the pledge in writing be furnished by the plaintiffs, then the agreement in writing, according to its expressed terms, when signed by the thirty-three members, will have full force and effect.

The question in this class of cases is not, however, whether the condition sought to be proved is in conflict with or varies the writing, but whether the written paper purporting to be a contract shall ever take effect as such. Proof of the nonperformance of the condition precedent has the effect of establishing the fact that the writing purporting to be a contract never in fact took effect as such. It is well settled both in England and this country that parol evidence is admissible to show that a written contract not under seal, although manually delivered, was not to become a binding or valid contract until the

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performance of some condition precedent. The purpose of such evidence is to show that the written instrument was not, except in the contingency named, to become a contract, and that the contingency never happened; and it therefore does not contradict the writing. *Nutting v. Minn. F. Ins. Co.* 98 Wis. 26, 73 N. W. 432; *State ex rel. Jones v. Chamber of Commerce,* 121 Wis. 110, 98 N. W. 930; *Ware v. Allen,* 128 U. S. 590, 9 Sup. Ct. 174; *Thorne v. Ætna Ins. Co.* 102 Wis. 593, 78 N. W. 920; *Skaaraas v. Finnegan,* 31 Minn. 48, 16 N. W. 456; *Blewitt v. Boorum,* 142 N. Y. 357, 37 N. E. 119; *Burke v. Dulaney,* 153 U. S. 228, 14 Sup. Ct. 816; *Wilson v. Powers,* 131 Mass. 539; *McFarland v. Sikes,* 54 Conn. 250, 7 Atl. 408; *Benton v. Martin,* 52 N. Y. 570; *Reynolds v. Robinson,* 110 N. Y. 654, 18 N. E. 127; *Hartford F. Ins. Co. v. Wilson,* 187 U. S. 467, 23 Sup. Ct. 189; 2 Jones, Ev. § 478; 2 Taylor, Ev. (8th ed.) § 1135; *Pym v. Campbell,* 6 El. & Bl. 370. It seems to be firmly established by the foregoing cases and many others which might be cited that "the manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced." *Wilson v. Powers,* 131 Mass. 539, 540. We think this well-settled doctrine rules the case at bar.

Counsel for appellant refers to the language of this court in *Thorne v. Ætna Ins. Co., supra,* to the effect that this rule approaches closely to an infringement upon the principle that a written contract cannot be varied or contradicted by parol, and, therefore, such defense is subject to suspicion. But, conceding that the rule should be cautiously applied and the facts clearly proved, the case at bar is strictly within the rule. The written pledge amounting to a condition precedent to the validity of the contract was fully proved and found by the jury. The pledge was presented and signed by several at the

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time the agreement in question was being signed. But the plaintiffs failed to secure a pledge in writing for the product of the number of cows agreed to be furnished, and hence failed to show a performance of the condition precedent necessary to give validity to the contract. It follows that the evidence offered to prove the condition precedent to the validity of the contract was properly admitted, and that the judgment, therefore, must be affirmed.

By the Court.—Judgment affirmed.

CASSODAY, C. J., took no part.

A motion for a rehearing was denied June 21, 1906.

KOMP, Plaintiff in error, vs. THE STATE, Defendant in error.

April 21—June 21, 1906.

Perjury: False affidavit: Evidence: Administration of oath: Examination of witnesses by court: Order of proof.

1. The official certificate of a notary, with proof of the authenticity of his and the affiant's signatures, is *prima facie* proof of the proper execution of an affidavit; and in a prosecution for perjury based thereon evidence that the oath was never actually administered must be strong and convincing to authorize the court to take the case from the jury.
2. Although, in such a case, the defendant testified positively that the notary never administered any oath, and the notary could not testify to a distinct remembrance of the exact facts of the transaction, which occurred about three years before the trial, the official certificate and the notary's testimony as to his practice and his recollection as aided by the document itself are *held* sufficient to sustain a conviction.
3. The trial judge may, in the exercise of a sound discretion, examine or cross-examine a witness in a criminal case; but the power should be most carefully exercised for the purpose of making clear that which is not clear, and the questions should

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not betray bias or prejudice nor carry to the jury the impression that the judge has made up his mind as to the facts.

4. The question being as to the truth of an affidavit that fifty per cent. of the capital stock of a trust company had been paid in in cash, evidence that the affiant, who held a large part of the stock, was in straitened circumstances at and prior to the time the stock was issued was admissible, and error in admitting such evidence before any proof as to the amount of stock held by the affiant was cured by the subsequent production of such proof.

ERROR to review a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Martin J. Gillen, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, A. C. Titus,* assistant attorney general, and *Robert Verne Baker,* district attorney of Kenosha county, and oral argument by *Mr. Titus.*

WINSLOW, J. *Frank S. Komp* was prosecuted and convicted of the crime of perjury, and brings his writ of error to reverse the judgment.

It appeared on the trial that in the month of October, 1902, *Komp* organized an incorporated trust company at Kenosha, Wisconsin, with a nominal capital stock of $50,000, and became president of the company; that on or about October 30, 1902, an affidavit was prepared by Mr. Peter Fisher, a lawyer and notary public residing at Kenosha, as required by the terms of sec. 1791*d*, Stats. 1898, stating that fifty per cent. of the capital stock of said corporation had been paid in in cash; that this affidavit received the signature of *Mr. Komp* and purports to have been sworn to before Mr. Fisher on said last-named date, and was afterward filed in the office of the secretary of state; and that no more than $1,000 of the capital stock had in fact been paid in in cash at that time.

The first and most serious contention is that the evidence was not sufficient to justify a finding that the affidavit was ever in fact sworn to. It bore the jurat and official signature

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and seal of Mr. Fisher, but *Komp* testified that it was drawn by Mr. Fisher at his request and delivered to him (*Komp*) October 30th, that he took it to his own office and there signed it, and a day or two afterward returned it to Mr. Fisher, signed, and told him it was all right, and Mr. Fisher took it but never administered any oath. On the other hand, Mr. Fisher testified after examination of the paper that to his best belief and judgment he administered the oath to *Komp* on or about the date of the jurat. On cross-examination he testified that he was a busy man, and administered many oaths; that he kept no record of them; that he did considerable work of this nature for *Mr. Komp;* that his testimony was based on the fact that he made a practice not to put his name to a jurat unless he swore the affiant, and upon the fact that he found his name signed to the jurat and the affiant's name signed to the affidavit; that he had no definite recollection independent of the papers, and that his best judgment, based upon the facts stated, was that the oath was administered. Upon rebuttal, after hearing the testimony of *Mr. Komp,* Mr. Fisher was again put upon the stand and testified as follows:

"*A.* My best recollection of that transaction, since I have heard *Mr. Komp* testify, is this: That the affidavit was prepared by us and either sent to or delivered to *Mr. Komp;* that he brought it back to my office the same day, or very soon afterwards; that he said he had read over the affidavit, and that it was all right; showed me his name; said he had signed it. We were standing by the table in my waiting room, and I said, '*Mr. Komp,* you swear that the facts set forth in this affidavit are true?' and he said, 'Yes.' Then I took it and went into the back room and I don't think *Mr. Komp* came in; signed the jurat and put on the seal. I am not absolutely sure of this, but from his statement this afternoon it seems to me that is the way the transaction took place. I would like to say in connection with that, that on account of certain occurrences at one time some years before it, when Mr. Cavanaugh and I were partners, we had said that we never would put our names, either one of us, to a jurat without

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swearing a party. I am trying ever since to carry that out. I am relying somewhat upon my practice about that, perhaps full as much as my memory, in this specified case.

"*Cross-examination: Q.* Standing alone on your recollection of the transaction, will and can you deny positively that what *Frank S. Komp* stated here is not true? *A.* I deem my answer too important in this case to say that I can. It is my best judgment that it is not true, but it is important, and I will not say that he cannot, in any event, be right."

The official certificate, with proof of authenticity of the signatures of the affiant and the officer, was sufficient *prima facie* proof of the proper execution of the affidavit. *State v. Madigan,* 57 Minn. 425, 59 N. W. 490; *Comm. v. Warden,* 11 Met. 406. Mere want of present recollection as to the exact circumstances under which the oath was taken will not necessarily control the presumption of fact arising from the official certificate. *Comm. v. Kimball,* 108 Mass. 473. It is frequently held that the evidence must be perfectly clear, convincing, and satisfactory in order to justify a court in holding that an official certificate of acknowledgment of a deed is false. *Linde v. Gudden,* 109 Wis. 326, 85 N. W. 323. This presumption of fact arising from the certificate may, of course, be rebutted by evidence that the oath was never actually administered, but such rebutting testimony must necessarily be strong and convincing to authorize the court to take the case from the jury. Ordinarily the issue thus presented will be an issue for the consideration of the jury. Were the rule otherwise it would be very easy to defeat a prosecution for perjury when the affidavit was sworn to before a busy man. Such a man will rarely have personal recollection of the fact, and the best that he can do will probably be to testify generally to his practice and his recollection, as aided by the document before him. The testimony of Mr. Fisher bears the impress of the testimony of a careful, conscientious officer, one who desired to state exactly the facts within his recollection, no more and no less. It really is more persuasive than an at-

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tempt to testify to a distinct present recollection of the exact facts of a transaction occurring in the midst of active business affairs some three years before. We entertain no doubt of its entire sufficiency, in connection with the official certificate, to sustain the verdict rendered.

It appears from the record that the circuit judge of his own motion carefully examined the accused as to the circumstances of his delivery of the paper to Mr. Fisher, and this examination is now complained of as tending to prejudice the accused in the minds of the jury by giving them to understand that he disbelieved his version of the transaction. The right of a trial judge, in the exercise of a sound discretion, to examine or cross-examine a witness cannot be doubted. It is a right that is sometimes most valuable in the administration of justice, but it should be most carefully exercised, and the questions put should not betray bias or prejudice, nor carry to the jury the impression that the judge has made up his mind as to the facts. The questions should be framed to make clear that which is not clear. Within these limits there can be no just fault found with the fact that the trial judge asks some questions of a witness. *Yanke v. State,* 51 Wis. 464, 8 N. W. 276; 12 Cyc. 539; *State v. Hazlett* (N. Dak.) 105 N. W. 617. We have examined the questions complained of here, and are clearly of opinion that the trial judge did not transgress the rules above indicated in his examination of the accused.

It was necessary for the state, in making its case, to show that as a matter of fact fifty per cent. of the capital stock of the trust company had not been paid in in cash at the time the affidavit was made. In order to show this fact the state called two witnesses whose testimony tended to show that they were acquainted with *Komp* during the years 1901 and 1902, and had business dealings with him, and that he was in straitened circumstances financially during all of this time. At the time this testimony was offered there had been no testimony intro-

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duced tending to show that *Mr. Komp* owned any stock in the trust company, so that it was not properly admissible at the time it was offered. It appears, however, that this departure from the regular order of proof resulted from the fact that there was no witness at hand at the opening of the trial who could identify the books of the trust company. Later in the course of the state's case a witness was produced who was the treasurer of the trust company, and who did identify the books, and they were offered and received in evidence. From the stock certificate book so introduced it appeared that *Komp* held 120 shares of the stock, of $100 each, as trustee, and eighty shares individually, which had been issued to him in October, 1902, and were held by him at the time the affidavit was made. The fact that he held eighty shares individually certainly made the proof of his financial condition just prior to the issue of the shares admissible upon the question whether it was in fact paid for in cash, and cured the error in the original ruling. It was afterward fully proven by the treasurer that no more than $1,000 of the stock was paid in cash, and *Komp,* when on the stand in his own behalf, admitted that the statement in the affidavit that $25,000 had been paid in cash was false.

There are no further errors claimed which require specific treatment. The accused seems to have had a fair trial without prejudicial error, and we see nothing to indicate that a just result was not reached.

By the Court.—Judgment affirmed.

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PONTI and others, Respondents, vs. ECKELS and another, Appellants.

May 8—June 21, 1906.

Lien of subcontractor: Foreclosure: Personal judgment against owner: Service of notice of claim: Evidence: Return of officer: Building contract: Extras.

1. In an action to foreclose a subcontractor's lien a personal judgment against the owner is erroneous in the absence of evidence showing his personal liability to the plaintiff.
2. The fact that plaintiff's attorney or some third person was unable to find in the county any agent of the owner to whom notice of the lien claim could be given in compliance with sec. 3315, Stats. 1898, does not show the plaintiff's inability to find such an agent, especially where it appears that the owner had an agent in the county and that plaintiff while doing the work as subcontractor had had continual dealings with said agent in his capacity as such.
3. The notice of claim for a subcontractor's lien is not process, and a certificate or return signed by a deputy sheriff, to the effect that after diligent search in the county he was unable to find the owner or any agent upon whom such notice could be served, has no evidentiary force.
4. Under a building contract providing that the architect might direct alterations only by making a written agreement with the contractor in advance, if no such agreement was made and there was no waiver by the contractor a subcontractor cannot recover from the contractor for extra work done without the consent or authority of the latter.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

Action to foreclose mechanic's lien. Defendant *Findley*, having taken a contract to build a house for defendant *Eckels* according to certain plans and specifications, sublet a contract for the mason work and materials according to said specifications to the plaintiffs for $3,555. The plaintiffs proceeded with the work and claimed to have completed it, and defendant *Findley* went on with the construction of the rest.

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of the house according to numerous modifications of the design. He paid large sums of money to the plaintiffs and for the labor and material employed and purchased by them. Within sixty days after plaintiffs' last work a notice was issued and filed in the office of the clerk of the circuit court for Waukesha county to the effect that the plaintiffs would claim a subcontractors' lien, which notice bore an indorsement signed "E. W. Delaney, Deputy Sheriff Waukesha County," certifying that after diligent search in Waukesha county covering about two months prior to September 1, 1903, he had been unable to find either defendant *Eckels* or any agent upon whom he could make service of the paper thereto attached. No other attempted proof of effort to find either *Eckels* or an agent was made, except the testimony of plaintiffs' attorney that he wrote a letter to an acquaintance at Oconomowoc, who replied that he had no knowledge of any such agent. Suit was thereafter commenced claiming a subcontractors' lien for the balance of contract price, and extras ordered by defendant *Findley,* in the sum of $315.40, making a total claim of $1,504.07. The answer alleged payment to the plaintiffs of $3,656.40, complete failure of plaintiffs to perform their contract, and also damages from defective work in breach of the contract by plaintiffs to the amount of $550, making a total of $4,206.40, for which, by counterclaim, judgment was demanded against the plaintiffs. *Eckels's* answer was substantially a general denial of everything except the contract between him and *Findley.* The court found that plaintiffs had substantially performed their contract; that they were entitled to certain extras aggregating $119.90; that defendant *Findley* had paid $3,013.78, and that there was defective work repaired or rebuilt to the sum of $127.68, and accordingly rendered personal judgment against both *Eckels* and *Findley* for said sum of $536.44, together with costs, and that said amount be a lien upon the interest of *Eckels* in the premises described, and for enforcement of the lien in the

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usual form, with order for deficiency judgment. From that judgment both defendants appeal.

John A. Kelly, for the appellants.

C. E. Armin, for the respondents.

DODGE, J. The personal judgment against the defendant *Eckels* is so obviously unwarranted and erroneous as to be quite inexplicable. There is no pretense either in allegation or proof of any privity between the owner and the subcontractors, or of any promise by the former to pay the latter, from which could result personal liability.

Another error assigned in the interest of defendant *Eckels* is the failure to give notice to him or his agent of a claim to subcontractors' lien, in compliance with sec. 3315, Stats. 1898. That statute requires that within sixty days a notice be given to the owner, or his agent, if to be found in the county, and, if neither can be found therein, by filing such notice in the office of the clerk of the circuit court of said county. Manifestly the burden of proof is upon the plaintiff claiming a lien to show the existence of a condition which justifies omission to serve the notice on the owner or his agent, and to substitute therefor a filing in the clerk's office. The proof is overwhelming and undisputed that at all times material to this case defendant *Eckels,* who resided in Chicago, did have an agent in charge of the building and grounds on which it was situated, in the town of Oconomowoc, in Waukesha county, and that the plaintiffs knew such fact, having had continual dealings with such agent in his capacity as such while engaged in doing their work. Against this there is no evidence except that mentioned in the statement of facts, which, even if accepted as evidence, does not at all controvert either the existence of such an agent or that plaintiffs knew of him. The fact that a plaintiff's attorney, or some third person, is unable to find any agent by no means proves the plaintiff's inability

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when he is shown to have such knowledge as above stated. Further, there is no evidentiary force whatever to the so-called return or certificate signed by the deputy sheriff. An official certificate is evidence only by virtue of the statute, and none can be found giving such effect to a mere declaration by a deputy sheriff that he has searched for, and has not found, a certain person; unless indeed as a part of the return upon process, and whether then or not we need not decide. The notice in question is in no sense process. It issues from no court, but is wholly *inter partes*. *Dusick v. Green,* 118 Wis. 240, 95 N. W. 144. We must conclude, therefore, that there is no proof of a legal service of any notice of subcontractors' lien; indeed, that the negative is overwhelmingly established; hence that plaintiffs are not entitled to any subcontractors' lien, and judgment should have gone in favor of defendant *Eckels.*

The failure of lien, however, does not prevent recovery against the person liable for the debt. Sec. 3324, Stats. 1898. Hence we must proceed to a review of the errors assigned upon the amount adjudged in plaintiffs' favor against *Findley.* After some hesitation we have reached the conclusion that we cannot say with the necessary certainty that the evidence preponderates against the court's finding that the plaintiffs substantially performed the work contracted for, although there is very much evidence of great recklessness and insubordination and of defective workmanship. We therefore cannot set aside this finding, from which results the right of the plaintiffs to recover the contract price, subject to such deductions and offsets as may result from the expense or damage caused to the defendant *Findley* by reason of defects or insufficiencies in the work.

On the subject of extras, however, we find not only no evidence to support any liability of *Findley,* but evidence from both plaintiffs and defendant that none of the extras claimed

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were performed by the direction or with the consent or authority of *Findley,* nor under any promise by him to pay therefor. Neither do we find, as in some building contracts, that *Findley* consented that the supervising architect might direct extras. The nearest approach to such a provision is that such architect may direct alterations only by making a written agreement with *Findley* in advance, specifying such alterations and fixing the extension of time justified thereby and the price thereof. There is no pretense that any such agreement was made with reference to any of the so-called extras claimed by the plaintiffs, nor that *Findley* in any way waived the contract requirement. Hence we must conclude that the allowance of $119.90 for extras was in defiance of all evidence.

Upon the subject of payments, after an examination of the record we are unable to discover that defendant has successfully proved any, either to the plaintiffs or upon their authority, greater than the amount allowed by the court. While it may well be that defendant's own evidence establishes payments in much larger amount, he has failed to show any authority for a large part thereof, and has also failed to show the payment of considerable sums which the plaintiffs admit having authorized. The total of those which he shows he has paid for which he shows any authority or request by plaintiffs does not exceed the $3,013.78 allowed by the judgment.

Much the same state of evidence exists with reference to the alleged damages occasioned defendant *Findley* by the defective and unworkmanlike manner in which plaintiffs performed the work. Either there is no evidence as to the expense necessary to remedy such defects, or there is failure of proof that defendant *Findley* has been or will be put to such expense. The amounts of which there is any reasonably clear and direct proof do not exceed the $127.68 allowed in the judgment. Hence we are unable to reverse findings of the trial court upon these subjects, and its conclusion that *Find-*

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ley is indebted to the plaintiffs for the amount adjudged must stand, except as to the item of $119.90 allowed for extras.

By the Court.—Judgment reversed, and cause remanded with directions to enter personal judgment in favor of the plaintiffs and against the defendant *A. Findley* alone for the sum of $416.54, together with interest from October 7, 1903, the date of commencing suit; also to dismiss the complaint as against defendant *James H. Eckels.*

MODERN STEEL STRUCTURAL COMPANY, Respondent, vs. ENGLISH CONSTRUCTION COMPANY and another, Appellants.

May 8—June 21, 1906.

(1) *Pleading: Liberal construction.* (2–8) *Building contracts: Failure to complete on time: Delay of subcontractor in furnishing materials: Damages recoverable by contractor: Waiver: Certificate of architect.*

1. Under the rule that pleadings should be liberally construed with a view to substantial justice between the parties, no pleading is to be condemned if the allegations of fact claimed to have been stated can be read therefrom with reasonable certainty, though its allegations be in form uncertain, incomplete, and defective.
2. Damages which a contractor was entitled to recover from a subcontractor for delay in furnishing materials are *held* not to have been waived by the making of a later agreement between the owner and contractor providing for enlarging the building (then not completed) at an increased price and for an extension of the time for its completion, and further providing that the contractor should make certain payments in lieu of the penalty incurred for failure to complete the building on time, but making no provision as to any damages which the contractor might have sustained by reason of the delay.
3. Where it was understood that, in regular course, structural iron would be needed to work into a building in the early part of a

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building season, a subcontractor who had agreed to furnish such iron as it might be wanted and had been expressly directed in July to furnish some of it immediately, but failed to furnish it until the latter part of November, when the building season had practically closed, was liable to the principal contractor for the damages caused by such delay, even though he had been unable sooner to obtain the iron from the manufacturers.

4. Payment of a large sum by a contractor to a subcontractor under circumstances which warranted the contractor in believing that the money was accepted on the condition that his losses from delays on the part of the subcontractor would be adjusted later, did not amount to a waiver of the claim for damages on account of such delays.
5. The fact that payment by a contractor to employees and subcontractors of the amounts they actually lost by reason of delays caused by another subcontractor was made without notice to the latter does not preclude the contractor from recovering such amounts as damages from the subcontractor who caused the delay, it being still open to the latter, notwithstanding the payment, to contest such claims in every respect.
6. Where the inability of a contractor to complete a building at the agreed time was caused by a subcontractor's breach of his agreement to furnish material, and the contractor, in lieu of the penalty incurred, was required to pay the salary of the superintendent thenceforward until the completion of the building, the amount which he was so required to pay was a proper counterclaim against the claim of the subcontractor against him.
7. A provision in a building contract that the superintendent should determine "the amount of damages which may have accrued from any cause" and that his certificate and decision should be binding and conclusive in all matters, is *held* to apply only to the owner and principal contractor and not to have become a part of a subcontractor's agreement. *Stein v. McCarthy*, 120 Wis. 288, distinguished.
8. After his failure to complete a building at the agreed time, caused by a subcontractor's delay in furnishing materials, a contractor made a new agreement to construct, for an additional consideration, certain parts of the building not included in his original contract. *Held*, that he could not recover from the subcontractor for time spent in doing the new work, but only for time lost, by reason of the delay, in performing the work covered by the original contract.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

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On April 16, 1901, the *English Construction Company*, then composed of *John English* and James Mair, made a contract with Lincoln county to build a county courthouse. The construction company, by this contract, agreed to do the work and to furnish the material for the construction of this building, except the heating, plumbing, and electric wiring, in accordance with the requirements of the plans and specifications prepared by Van Ryn & De Gelleke, which had been adopted by the county. As a consideration for the erection and completion of this building the county agreed to pay the construction company $60,606; payments to be made as the work progressed, on the certificates of the architects or the superintendent, at eighty-five per cent. of the estimated value; final payment of all sums due to be made when the building was completed to the satisfaction of the architects and the committee representing the county. The building was to be inclosed and roofed before the expiration of the year 1901, and completed for occupancy by the county on or before September 1, 1902; provided no delays in the construction of it were occasioned by strikes, epidemics, or quarantines. The following was the stipulation as to the time of completion of the building:

"It is further agreed, should the contractor fail to finish the work at or before the time agreed upon, he shall pay to or allow the said county, by way of liquidated damages, the sum of twenty-five ($25.00) dollars per diem for each and every day thereafter the said work shall remain incomplete."

The plaintiff entered into a contract with the construction company, as a subcontractor for the ironwork, and agreed as follows:

"MERRILL, WIS., May 27, 1901.

"*English Construction Co., Merrill, Wis.*

"Gentlemen: We hereby propose to furnish iron work for Lincoln county courthouse as per plans and specifications, put in place, for seven thousand three hundred sixty dollars ($7,360.00). You to set the castings in place, also the iron

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gratings. Monthly estimates of 85 per cent. to be allowed us on this job.

"Yours truly,

"MODERN STEEL STRUCTURAL CO.

"By J. L. Bickels, Bus. Mgr.

"We hereby accept the above proposition.

"ENGLISH CONSTRUCTION CO.

"By *John English.*"

The specifications made provision for changes and alterations, and, as incidental to such variation from the original plans and specifications, for additions to and deductions from the cost; for the architects' control and decision; and for the appointment of a superintendent by the county building committee. Among the duties imposed upon the superintendent were:

"Giving on demand any certificate that the contractor may be entitled to, . . . *also determining the amount of damages which may have accrued from any cause,* and particularly to decide upon the fitness of all material used and work done. The superintendent's opinion, certificate, report, and decision on all matters to be binding and conclusive."

The specifications further provided that all contractors should comply with all things appearing therein, under whatever heading it might appear, if it affected the contractor's work. The construction company entered upon the execution of the contracts in the month of June, 1901, and soon thereafter demanded that plaintiff immediately furnish a portion of the iron for use in the construction of the building. This the plaintiff failed to do, and did not actually deliver such iron until about December 1, 1901—too late in the building season of that year to proceed with the construction of the building.

On September 1, 1902, the county and the defendant, the construction company, made an agreement:

"Amendatory of articles of agreement made under date of April 16, 1901, between the same parties.

"Witnesseth: That said party of the first part, for and in

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consideration of the increase in the consideration hereinafter provided for, does hereby covenant, contract, and agree to complete all of the work not yet done as provided in the original contract, on the courthouse therein referred to, according to the plans, specifications, and drawings originally provided for the building of the said courthouse (which are declared to be a part of this agreement) made by Van Ryn & De Gelleke, architects, with the exception of the cement work in the basement, and the ornamental cresting on the deck of the roof, provided in such plans, specifications, and drawings. By 'original plans, specifications, and drawings' being meant those which were originally submitted by Van Ryn & De Gelleke, architects, but which were modified and cut down so as to come within the appropriation made by the county board, which original plans, specifications, and drawings are now on file and in the possession of the county clerk of Lincoln county, Wisconsin. With the exception of the change from the modified plans, specifications, and drawings, all of the terms of the original contract hereby amended are to be considered in full force and binding, with the exception of such as are hereafter specifically referred to. The time for the completion of the work under the said contract is hereby extended to May 1, 1903. The consideration of said contract as hereby amended is changed from the sum of $60,606 to $80,323, to be paid in the same manner as provided in the original contract. It is further agreed and provided that from such consideration shall be deducted the salary of superintendent from September 1, 1902, to the time of the completion of the building, as hereby extended, at the rate of $45 per month."

The building was completed under these agreements; plaintiff furnished all the ironwork and did all the work required by its contract for the completion of the building as agreed, except a railing on the second-floor landing, which defendant supplied at a cost of $20.85. The plaintiff commenced this action to recover an alleged balance, amounting to $500.24, due it under its contract with the defendant.

The defendant *John English,* appearing in the action as the member of the defendant company who had acquired all the rights and assumed the obligations of the company grow-

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ing out of the transaction covered by this action, alleged the making of the various contracts for the construction of the courthouse, entrance upon the erection and execution of the work, inability to complete it within the time limited by the original contract, its modification by the agreement of September 1, 1902, and the completion of the building under these agreements in 1903. He also alleged that the plaintiff's omission to comply with its agreements to provide the iron for the building as required in the course of the construction of the building was the sole cause of the delay in completing it as agreed in the original contract, and of his inability to comply with it; that, as a result of such delay by the plaintiff, he was compelled to make the agreement of September 1, 1902, and that he had suffered damages through plaintiff's failure to provide iron at the appropriate time in the course of the construction of the building, consisting of the following items: (1) For failure to furnish railing on second floor. (2) To amount paid Durner, subcontractor for the tile work, for loss of time and expense incurred through plaintiff's delays in furnishing iron. (3) To the value of his own time from September 1, 1902, to the completion of the building in 1903. (4) To amount paid masons and carpenters for loss of time while waiting for iron. (5) To the superintendent's salary, paid in lieu of the penalty provided by the original contract; and that said items amount in all to $3,893, which sum is now demanded by way of counterclaim in the action. The plaintiff denied liability as claimed in the counterclaim.

The action was tried by the court, and it found that plaintiff had completed its contract, except that it omitted to furnish the railing on the second-floor landing; that there was due plaintiff as a balance on said contract the sum of $500.24, less $20.85 for failure to furnish the second-floor railing; and awarded judgment against defendant for the difference, namely, $479.35, with interest thereon from September 5, 1903, and amounting to $57.12; and for costs and disburse-

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ments, taxed at $52.69. This is an appeal from such judgment.

For the appellants there were briefs by *John Van Hecke,* attorney, and *Tullar & Lockney,* of counsel, and oral argument by *Mr. Van Hecke* and *Mr. D. S. Tullar.*

For the respondent there was a brief by *Ryan, Merton & Newbury,* and oral argument by *Mr. T. E. Ryan.*

SIEBECKER, J. The contention is made that the trial court erred in holding that the reply to the counterclaim put in issue the amount claimed to be due defendant as damages for plaintiff's breach of contract as subcontractor. Under the rule that pleadings should be liberally construed with a view to substantial justice between the parties, no pleading is to be condemned if the allegations of fact claimed to have been stated can be read therefrom with reasonable certainty, "though its allegations be in form uncertain, incomplete, and defective." We think the court ruled properly in holding that the reply put in issue the allegations of the defendant's counterclaim for damages. *Manning v. School Dist. No. 6,* 124 Wis. 84, 102 N. W. 356.

The trial court determined that plaintiff was not liable in damages to defendant upon the alleged counterclaim for delay in furnishing the iron, upon the ground, apparently, either that plaintiff was not guilty of any delay in performing its contract to furnish the iron for this building, or, if guilty of delay under the original contract, that all damages covered by it were waived on September 1, 1902, under the modification of the agreement which provided for enlarging the structure and for an additional consideration of about $20,000. This contract, however, makes no provision for, nor do its conditions contain a waiver of, any damages which defendant may have sustained by reason of the delay in the construction of the building under the original contract; nor does it provide for payment of the damages incurred by way of payment for

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time and labor to his subcontractors and laborers, or for the payment of the superintendent's salary from September 1, 1902, which was in lieu of the penalty incurred for failure to complete the building within the time fixed in the original contract. It is apparent that if defendant actually sustained losses on account of the delay in receiving the iron for the building, as he claims, he has not been paid such losses under the modified agreement of September 1, 1902.

Plaintiff insists that, if defendant's counterclaim is to be considered under the facts alleged, the evidence wholly fails to show that plaintiff was guilty of a breach of contract in furnishing and putting in place the ironwork for the building. It was expressly specified that if a subcontractor failed in furnishing the material and labor "as it may be wanted to work into the building, he will be accountable for all delays and damages in consequence of any such neglect." Plaintiff, as subcontractor, accepted this condition and was bound to comply with its requirements. It appears clearly that plaintiff was expressly directed by letters of July 6, 1901, to proceed to procure the iron material required by the plans and specifications under their contract of the preceding May 27th, and on July 26th was notified to furnish the basement gratings immediately and to provide for floor beams. In the early part of the summer of 1901 the work of construction had been completed to a point where the iron was needed to enable defendant to continue the construction. Plaintiff failed to furnish such iron until the latter part of November, when the building season had practically closed. Under the facts and circumstances of the transaction we are unable to find any ground for saying that this delay by plaintiff could in any conceivable way be deemed permissible under the contract. It is obvious that the parties understood that, in the regular course of constructing the building, the iron would be needed to work into the building in the early part of the season of 1901. In view of these circumstances it must follow that

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plaintiff became liable to defendant for any damages suffered on account of delay in furnishing the iron. It is insisted that plaintiff did all it reasonably could to supply the iron as it was needed, and that it was unavoidably delayed by the manufacturers in manufacturing and forwarding it. There is no stipulation in the contract making such inability to secure the material from manufacturers a condition excusing performance and relieving plaintiff from the consequences of nonperformance of its terms.

The further claim is made that the conclusion of the trial court should be sustained upon the ground that plaintiff waived any right to recover damages upon the counterclaim by paying respondent $1,500 in September, 1903, after the completion of the work, and by failing to give notice, before making payment, of any claim for damages by the respective claimants. The evidence shows that the payment of $1,500 was made to plaintiff's representative under circumstances which warranted defendant in believing that plaintiff accepted it through its representative on the condition that defendant's losses would be adjusted thereafter. This leaves no basis for claiming a waiver as against him upon this ground; nor is defendant precluded from now insisting upon the counterclaim by reason of paying to his employees and subcontractors the amounts they actually lost by reason of plaintiff's delay, without giving notice to plaintiff. It is argued that such notice should have been given to enable it to contest such claims before payment of them. The argument is, however, fully answered by the fact that payment of these amounts in no way establishes plaintiff's liability for them to defendant. It is incumbent on defendant to show that they are attributable to plaintiff's breach of contract and are therefore items of damages recoverable under his counterclaim. This preserves to plaintiff the right to contest them in every respect, regardless of any payment defendant may have made to third parties.

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This brings us to the question of whether the evidence sustains the counterclaim. An examination of it shows that all of the evidence material to these claims is practically uncontradicted. It appears that the tiling contractor, Durner, suffered damage amounting to $88, attributable to plaintiff's failure to furnish the iron as needed in the course of the construction of the building. This defendant has paid and is entitled to recover. It also appears that defendant for the same reason sustained losses for time lost by masons and carpenters employed by him in the construction of the building, amounting to the sums of $324 and $260. The item of $315, paid as salary for the superintendent in the construction of the building after September 1, 1902, and deducted from the amount due defendant from the county after completion of the building, is a proper counterclaim, because the testimony establishes that defendant paid it for his failure to complete the building by September 1, 1902, in lieu of the penalty incurred by him under the original contract. As already stated there is practically no controversy but that under the facts and circumstances plaintiff's failure to comply with its contract for furnishing the iron was the cause of defendant's inability to complete the building by September 1, 1902.

The remaining item of defendant's counterclaim is $3,000, the value of his time spent in the performance of work after September 1, 1902. He insists that this item should be allowed him upon the certificate of the superintendent given as of July 1, 1905. It is averred that the specifications provide for the appointment of a superintendent, and that he should give all certificates to which the contractor should be entitled, and should determine "the amount of damages which may have accrued from any cause," and that his certificate and decision should be binding and conclusive in all matters. These provisions were manifestly intended to apply to and bind the county and defendant, as the principal contractor in the construction of the building. The terms of this stipulation do

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not indicate, however, that it is to be deemed a part of a subcontractor's undertaking, and plaintiff's agreement does not expressly provide that it shall be part of it. The situation is not within the decision of *Stein v. McCarthy*, 120 Wis. 288, 97 N. W. 912, where the terms and conditions of the specifications and original contract were included as part of the obligation assumed by the subcontractor. It is therefore to be determined whether, under the facts and circumstances of the transaction, plaintiff is entitled to recover on this item of the counterclaim. As stated, under the agreement of September 1, 1902, he undertook to construct the parts of the building not included in the original contract for an additional consideration of $19,717. As so modified, the defendant performed his contract within the year following the expiration of the time originally agreed upon for the completion of the building. Having undertaken to build the parts of the building added to the original structure, it follows that the time necessarily occupied in doing this is not to be charged as additional to the time required for completion of the work originally undertaken. If any claim for damages for defendant's time can be made, it must be for time lost in performing the work of the original contract, and defendant has not shown that he lost any time before the expiration of the original contract, nor has he attempted to show that he spent extra time thereafter in completing the work covered by the original contract. Under these conditions there is a want of proof to sustain this item of the counterclaim.

Upon these considerations the judgment must be reversed, and the cause remanded with directions to the trial court to award judgment to defendant, allowing him the items of damages in his counterclaim as above specified.

By the Court.—It is so ordered.

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IN RE HORICON DRAINAGE DISTRICT.

May 8—June 21, 1906.

Drainage districts: Appointment of commissioners: Appealable order: When order is made.

1. In a proceeding to establish a drainage district a decision in writing that commissioners be appointed was made before, but the formal order appointing such commissioners was not entered until five days after, ch. 419, Laws of 1905, went into effect. *Held*, that the appealability of such order must be determined by the law as it stood prior to said act of 1905.
2. Even prior to the enactment of ch. 419, Laws of 1905, an order appointing commissioners in drainage proceedings was not "a final order affecting a substantial right" within the meaning of subd. 2, sec. 3069, Stats. 1898, and was therefore not appealable.

APPEAL from an order of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Dismissed.*

This is an appeal from an order of the circuit court for Dodge county in a proceeding to establish a drainage district under secs. 1379—11 to 1379—31, Stats. 1898, and acts amendatory thereof and supplementary thereto. The petition was signed by a corporation known as the Rock River Valley Lumber Company and others. It alleges, in substance, that the proposed district extends from the northern line of Dodge county southerly through Horicon marsh, the city of Horicon, and beyond the village of Hustisford, a distance of approximately twenty-three miles; that the district embraces about 35,000 acres of land and is traversed its entire length by the Rock river. It is further alleged that the Rock river is obstructed by dams, bridges, and other obstructions, and is insufficient to carry off the water which accumulates in ponds and gives rise to vapors, and that the same is dangerous to public health; that the land embraced in the territory is swamp and composed of decayed vegetation, and by reason of insufficient drainage is wet, moist, and impassable except

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in dry seasons, and is unfit for cultivation; that if said district were formed and the lands properly drained they would be of great value and contribute to a large extent towards paying the burden of taxation; that the bed of Rock river through said district has become obstructed with refuse matter, débris, decayed vegetation, and other obstructions; that the flow of the river with such obstructions is insufficient to carry off the water, and that it overflows its banks, spreads upon adjoining lands, and settles into ponds, pools, and sink holes, where the water becomes stagnant and gives forth unhealthy vapors, and is dangerous to the public health. The petition contains description of the lands embraced within the proposed territory, and alleges that the scheme necessitates the purchasing or condemning of a dam on the Rock river at Hustisford and the rights of flowage, removal of other obstructions from the river above and below said dam, removal of other dams on the river, deepening and cutting new channels in said river wherever necessary, constructing lateral drains and ditches across the lands described, and altering and removing supports of two railroad bridges in the city of Horicon. The petition further alleges that the petitioners are and constitute the owners of one half and more in area of the lands described, and contains other allegations required by the statute, and prays for the organization of a drainage district under the statute to be known as the Horicon Drainage District, embracing the lands described, and that three commissioners be appointed to execute the work, and for general relief.

The owners of the lands affected by the proposed scheme appeared by their attorneys and filed remonstrances and made motion to dismiss the petition, and also interposed a demurrer. The remonstrances were to the effect that some of the petitioners were induced to sign by fraud, that the proposed drainage would be detrimental to public health and welfare, that the scheme as proposed involved the destruction

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of a navigable lake and the cutting, changing, and shortening of a navigable river, that the scheme is impracticable and improbable if not impossible of successful accomplishment, and that the court had no power to authorize the work proposed. The state of Wisconsin also appeared and remonstrated on the alleged ground that in 1858 a dam was built on the Rock river and ever since has been maintained, and a lake created, the land under which is owned by the state in trust for the people. The Chicago, Milwaukee & St. Paul Railway Company appeared and remonstrated on the ground that its rights and property in the lands in question are and have been devoted to a public use, and that the statute does not grant the right to condemn such property for another public use.

The court declined to dismiss the proceeding or sustain the demurrer to the petition, and a hearing was had and testimony taken, after which the court on the 9th of June, 1905, made its decision in writing ordering the appointment of commissioners as provided by statute and formal findings and order to carry out the decision. Afterwards on June 27, 1905, and in pursuance of this decision, an order was entered appointing three commissioners, and further ordering that all proceedings thereafter be had under ch. 419, Laws of 1905, from which order this appeal is taken.

For the appellants there were briefs signed by *Lamoreux & Husting,* attorneys, and *J. L. O'Connor,* of counsel, and oral argument by *Paul Husting* and *C. W. Lamoreux.*

M. L. Lueck and *J. E. Malone,* for the respondents.

KERWIN, J. It is contended on the part of the respondents that the order is not appealable, and, if this position is tenable, no other question presented need be considered. The decision of the court appointing commissioners having been made on the 9th day of June, 1905, and before ch. 419, Laws of 1905, went into effect, the latter law has no application,

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and the appealability of the order must be determined by the law as it existed at the time the court made its decision. The fact that the order was entered on June 27th, five days after ch. 419 went into effect, is of no consequence, since the decision was made and announced June 9, 1905, and the subsequent entry of the formal order was the entry of the decision of the court made June 9th. The decision of the court and order made thereunder, therefore, must be regarded as made before ch. 419, Laws of 1905, went into effect, and its appealability must be determined by the law as it stood prior to the passage of said ch. 419. Since no appeal from this order is provided for under secs. 1379—11 to 1379—31, Stats. 1898, inclusive, as amended, the right of appeal must be found in the statute governing appeals from orders in special proceedings or it does not exist. The proceeding before us is clearly a special proceeding. Secs. 2594, 2596, Stats. 1898. Therefore no appeal is given from an order in such proceedings, except the order be a final order affecting a substantial right. Subd. 2, sec. 3069, Stats. 1898. As said by this court in the late case of *Kingston v. Kingston,* 124 Wis. 263, 264, 102 N. W. 577:

"A final order in a special proceeding, within the meaning of this statute, is one which determines and disposes finally of the proceeding—one which, so long as it stands, precludes any further steps therein. It bears the same relation to the proceeding in which it is entered as the final judgment bears to an action."

The order in question does not determine the proceeding so as to bring it within the class of appealable orders designated by the statute. Sec. 1379—11, Stats. 1898, respecting the establishment of drainage districts, provides for the filing of petition asking for the organization of a drainage district, and sets forth what the petition shall contain. Sec. 1379—12 provides for notice, and sec. 1379—13, as amended by ch. 43, Laws of 1901, provides for a hearing upon the petition, and

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further provides that, upon such hearing, if it shall appear that the petition has been signed as required, and that the proposed work is necessary or will be useful for drainage of lands proposed to be drained, and that the public health and welfare will be promoted by the construction of the work, the court shall so find and appoint three commissioners to lay out and construct the proposed work. Sec. 1379—14 provides for the taking and subscribing of an oath by the commissioners and the giving of a bond. Sec. 1379—15 provides that the commissioners shall proceed as soon as may be after their appointment, and within such time as the court may direct, to examine the lands described in the petition, and determine and report as specified in this section, and among other things report whether the benefits will equal or exceed the aggregate cost of construction including expenses, costs of proceedings, and damages. Sec. 1379—16 provides that, if the costs, expenses, and damages are more than equal to the benefits that will be bestowed upon the lands to be benefited, they shall so report, and the proceedings shall be dismissed at the cost of the petitioners. Sec. 1379—17 provides that the commissioners shall not be confined to the point of commencement, route, or terminus of the drain or ditch, or the location, plan, or extent of the work as proposed by the petitioners, but shall locate, designate, lay out, and plan the same in such manner as to them shall seem best designed to promote the public health and welfare and to drain or protect the lands of the parties interested with the least damage and greatest benefit. Sec. 1379—18, as amended by ch. 43, Laws of 1901, relates to action and hearing on report of commissioners, and provides that any owner of lands, person, or corporation affected may appear on the day of hearing and remonstrate against the whole or any part of the proposed work, and that such remonstrance shall set forth the objections, whether they go to the jurisdiction of the commissioners or the court, or

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whether they rest on any other fact, as that the lands are assessed too high, or too low, or improperly, or that lands are assessed which ought not to be, or that lands should be assessed which are not, or that the plans proposed should be changed, or the boundaries of the district altered, or that the public health or welfare will not be promoted by the proposed work, and provides for a hearing upon the objection. If the court finds that the report requires modification the same may be referred to the commissioners, who may be required to modify in any respect, and, if the finding be against the validity of the proceedings, the same shall be dismissed at the cost of the petitioners. If in favor of the validity of the proceedings, the court, after the report shall have been modified to conform to the findings, or if there be no remonstrance, shall confirm the same, and the order of confirmation shall be final and conclusive, and the proposed work established, subject to the right of appeal to the supreme court. This section further provides that the order of confirmation may at the same or subsequent term be revised, modified, or changed, and that the court may permit the commissioners to file a supplemental report, and, after notice to parties adversely interested, the court may upon hearing make such other order as the case may require.

It is very clear from these provisions of the statute that the order appointing the commissioners is not a final order from which an appeal can be taken, and that the appeal given under sec. 1379—18 is the first appeal contemplated by the statute under these proceedings. The order appointing commissioners does not finally determine or dispose of the proceeding, and under the provisions of the statute above referred to the same may be determined and finally disposed of and the proceeding dismissed upon hearing on the report. So, it is clear from the statute, as well as the decisions of this court, that the order appointing commissioners is not a final order affect-

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ing a substantial right from which an appeal will lie. *Kingston v. Kingston,* 124 Wis. 263, 102 N. W. 577, and cases cited.

It is unnecessary to go outside of this state in search of authority upon the subject. What constitutes a final order from which an appeal may be taken is well settled by the decisions of this court. Counsel for appellants rely with apparent confidence upon the decisions of this court, which, they claim, sustain their position that the order is appealable. In *In re Theresa Drainage Dist.* 90 Wis. 301, 63 N. W. 288, the question of appealability of the order was neither raised nor considered. In *Bryant v. Robbins,* 70 Wis. 258, 35 N. W. 545, and 74 Wis. 608, 43 N. W. 507, the appeal was from an order dismissing the petition, and, of course, where the petition was dismissed, the order dismissing it terminated the proceeding, and, so long as it stood, precluded any further steps therein. So, the orders were appealable under the repeated decisions of this court.

We are also cited to decisions holding that orders appointing or refusing to appoint commissioners in condemnation proceedings are appealable, and it is claimed that the appointment of commissioners for the condemnation of lands for the use of railroads, under secs. 1846, 1852, Stats. 1898, are similar to the proceedings here, but it will be seen from an examination of the statutes that such proceedings are quite different. In these proceedings the court determines before the appointment of commissioners the jurisdictional facts which authorize such appointment, and makes no further provision for subsequent consideration or review of these questions, the appeal provided for being from the award made by the commissioners, while in the case before us the statute expressly provides for a review of all matters upon the report of the commissioners, and for an appeal from the order confirming such report. The hearing upon the petition for the appointment of commissioners to condemn lands for railroads

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involves the questions whether the petitioner is entitled to take the lands for railroad purposes, whether it is required for such purposes, and whether it is the intention of the petitioner in good faith to construct the road authorized by its charter, and certain other facts which the statute requires to be established before commissioners can be appointed. All these questions are adjudicated and settled, and are the only questions for adjudication before appeal from the award. The commissioners then proceed without any further action of the court and make their award, from which an appeal may be taken to the circuit court. Upon filing the report in the judgment book, and at any time after the making of such award, the railroad corporation may pay to the clerk of the court for the use of the owners the amounts awarded by the commissioners, and thereupon enter upon, take, and use the lands for the purposes for which they were condemned, and may be put in possession of the same. So, it will be seen that under the railroad condemnation statute the whole matter, including the right to take possession of the property in question, is settled and determined by the order appointing commissioners and payment of award, subject to the right of appeal to the circuit court. The order, therefore, in railroad condemnation proceedings appointing commissioners is clearly a final order affecting a substantial right in a special proceeding.

Nor can we see that *Stone v. Little Yellow Drainage Dist.* 118 Wis. 388, 95 N. W. 405, supports appellants' contention. There the commissioners were appointed, and on January 4, 1900, made and filed their report, and same was confirmed. Afterwards in May, 1901, the court made an order modifying the order of January 4, 1900, and later, on July 18, 1901, on petition previously made and without notice, the court made an order confirming a second assessment and directing that the same fall due in instalments at dates between ten and twenty years thereafter, and authorizing commissioners to

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issue interest-bearing bonds. The complaint alleged these proceedings illegal and beyond the jurisdiction of the court, and prayed injunction against the commissioners prohibiting them from taking steps to collect such assessments and from issuing bonds under the order of the court. What was said in this case with reference to the right of appeal clearly had reference to the appeal provided for under sec. 1379—18, Stats. 1898, not to an appeal from the order appointing commissioners. At page 393 of 118 Wis. (95 N. W. 407) this court said:

"A remedy deemed by the legislators complete for the correction of any such errors existed in an appeal from the final order."

We deem further discussion of the question unnecessary. We hold that the order appealed from is not a final order from which an appeal can be taken. The fact that the court made findings of fact and conclusions of law does not improve appellants' position respecting the right of appeal. *Maynard v. Greenfield,* 103 Wis. 670, 79 N. W. 407; *Cook v. McComb,* 91 Wis. 445, 65 N. W. 181.

It follows that the order appointing commissioners is not appealable, and therefore the appeal must be dismissed.

By the Court.—It is so ordered.

COOPER, Appellant, vs. GRANGER, Respondent.

May 8—June 21, 1906.

Terms of court: Duration: Adjournments: Presumptions: Vacating judgment: New trial: Imposition of costs.

1. Under sec. 2572, Stats. 1898, a term of court does not come to an end upon an adjournment "subject to the order of the judge," but continues until the final adjournment thereof without day or the commencement of a new term.

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2. An order, dated on the day of the opening of a new term, recited that said day was an adjourned day of the previous term. After making the order the court adjourned *sine die*. *Held*, that it will be presumed that such adjournment took place prior to entering upon the business of the new term.
3. It was not error not to impose costs upon setting aside a verdict and judgment for the reasons, among others, that the court committed errors upon the trial and that the verdict was perverse.

APPEAL from an order of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This is an action for malicious prosecution. Issue being joined and trial had, the jury at the close thereof and on June 28, 1904, returned a verdict in favor of the plaintiff and assessed her damages at $400. Thereupon the court by an entry in the minutes ordered a stay of proceedings. July 18, 1904, the defendant entered a motion to set aside the verdict and for a new trial upon the minutes of the judge, and procured a stay of proceedings until further ordered. Upon the motion being called for hearing the defendant's attorney stated in open court that his client had changed his mind and did not want a new trial, whereupon the court ordered that such stay of proceedings be and the same was thereby set aside and vacated. July 19, 1904, the court "adjourned subject to the order of the judge." July 21, 1904, judgment was perfected in favor of the plaintiff for the amount of the verdict and costs. November 23, 1904, an attorney not of record in the case moved to set aside the verdict and grant a new trial upon the minutes of the court. Objection being made to the appearance of such attorney without substitution, leave was granted to the plaintiff to corroborate such objection by affidavit, and the court thereupon took the question under advisement and "adjourned subject to the order of the judge." December 30, 1904, the court overruled such objection, and ordered that the attorney who made such motion be and he was thereby substituted as attorney and counsel for the de-

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fendant. On January 3, 1905, "the June, 1904, term of court opened by order of judge," and the following written order was made:

"This action having been brought on for trial before the court and a jury at the regular June, 1904, term of said court, and the jury having returned a verdict herein in favor of the plaintiff and against the defendant, and this action having been brought before the court on this 3d day of January, A. D. 1905, on a motion to vacate and set aside said verdict and judgment herein, and said motion being heard on an adjourned day of said June, 1904, term of said court, and after hearing counsel for the defendant as well as counsel for the plaintiff, and the court being fully advised herein, on motion of John B. Hagarty, of counsel for the defendant, it is hereby ordered that the verdict and judgment herein be and the same are hereby vacated and set aside, because the same are against the law, and because the same are against the evidence, and because the court erred in instructing the jury, and because the court erred in excluding evidence offered by the defendant, and because the court erred in admitting evidence against the objection of the defendant, and for the reason that defendant's counsel failed to argue the case to the jury, and because the damages herein assessed by the jury are excessive, and because the verdict was and is perverse.

"Done this 3d day of January, 1905."

After granting said motion the court ordered that the judgment stand as security, and thereupon adjourned *sine die.* Afterwards and on June 6, 1905, said order was entered of record. From that order the plaintiff appeals.

The cause was submitted for the appellant on the brief of *G. E. Schwindt,* and for the respondent on that of *John B. Hagarty.*

CASSODAY, C. J. 1. The proceedings in the action between the time of the rendition of the verdict and the making of the order appealed from are fully set forth in the foregoing statement. It is urged that the order should be reversed because the motion to set aside the verdict and grant a new trial

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upon the minutes of the judge "was not joined with a motion to vacate the judgment." *Bailey v. Costello,* 94 Wis. 87, 93, 68 N. W. 663. But a sufficient answer to such objection is that the order itself recites and declares that "on a motion to vacate and set aside said verdict and judgment" the same were "vacated and set aside." We cannot say from the record before us that such statements were not correct.

2. It is further contended that such motion was improperly granted, because it was based upon the minutes of the judge and was not made and determined at the trial term, which was in June, 1904. *Whitney v. Karner,* 44 Wis. 563; *Dufur v. Home Inv. Co.* 122 Wis. 470, 100 N. W. 831. The argument seems to be that the adjournments of July 19, 1904, and of November 23, 1904, subject to the order of the judge, without any adjournment to a specific day, operated as a termination of the June, 1904, term of the court. The statute provides that a motion made but not decided during the term is deemed to be overruled, and an exception to such constructive denial is to be allowed. Sec. 2878, Stats. 1898, as amended by ch. 100, Laws of 1901. The statute also declares:

"No omission to adjourn any such court from day to day, previous to the final adjournment thereof without day, shall vitiate any proceedings in such court." Sec. 2572, Stats. 1898.

Under this section it has been held that "a term of court does not come to an end by failure to adjourn to a specific time, but once commenced it continues until terminated by an affirmative judicial act or by the commencement of a new term." *State ex rel. Barber v. McBain,* 102 Wis. 431, 435, 436, 78 N. W. 602. It follows that the June, 1904, term of the court continued until the commencement of the new term of the court, unless sooner terminated by the affirmative action of the court in adjourning such term. The first day of the new term was January 3, 1905. The order recites, in effect, that the "motion to vacate and set aside said verdict and judg-

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ment" was "heard on an adjourned day of said June, 1904, term of said court," being January 3, 1905, on which day the order was made and signed; and the record shows that upon granting said motion and ordering the judgment to stand as security the court adjourned *"sine die."* Such order was effectual though not entered of record until June 6, 1905. Thus, it appears that the adjournment of the June, 1904, term was on the same day as the opening of the new term. The fair presumption is that such adjournment of the June, 1904, term took place prior to entering upon the business of the new term. Certainly, error is not to be presumed.

3. Error is assigned for setting aside the verdict and judgment without imposing terms. The order appealed from states the grounds upon which it was based, and, among others, that the court erred in charging the jury, in excluding evidence, in admitting evidence, and because the verdict was perverse. The failure to impose costs in such a case is not error. *Maxon v. Gates,* 112 Wis. 196, 202, 88 N. W. 54, and cases there cited.

By the Court.—The order of the circuit court is affirmed.

SNIVELEY, Respondent, vs. KEYSTONE LUMBER COMPANY, Appellant.

May 8—June 21, 1906.

Deeds: Construction: Payment of taxes.

Where a conveyance of lands contained a reservation of timber thereon with the right to remove it, and provided that the grantor should "pay all taxes upon the lands . . . until it shall give a written release of said timber," the grantor was bound to pay only such taxes as, prior to the giving of the release, had become liens upon the land by extension on the tax roll and delivery of the warrant for collection.

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APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

George F. Merrill, for the appellant.

For the respondent there was a brief by *Luse, Powell, deForest & Luse,* and oral argument by *L. K. Luse.*

WINSLOW, J. This is an action to recover of the defendant the amounts paid by the plaintiff as taxes upon certain lands, on the ground that the defendant agreed to pay them. The facts are simple. The defendant originally owned the lands. On March 11, 1901, it conveyed them by warranty deed to one Ogden, the deed containing a reservation of all the timber of certain kinds upon the land, with the right to cut and remove the same on or before May 19, 1905, and the further provision that the grantor should "pay all taxes upon the lands . . . until it shall give written release of said timber, specifying particularly what descriptions of land are so released." Ogden conveyed the lands to the plaintiff December 7, 1901. On November 23, 1901, the defendant gave written notice to Mr. Ogden that it had removed the timber from certain parcels of the land particularly described and released said lands. On November 12, 1902, it gave like notice to the plaintiff as to certain other parcels, and on November 12, 1903, it gave like notice as to the remaining parcels. The defendant did not pay the taxes for 1901 upon the lands released November 23, 1901, nor did it pay the taxes for 1902 on the lands released in November of that year, nor the taxes for 1903 on the lands released in November of that year. In June, 1904, the plaintiff redeemed said lands from the sales for said unpaid taxes, and brings this action to recover the amounts so paid. The plaintiff claims that as the town taxes were levied as early as September in each year, and the state and county taxes early in November, they were all "taxes upon the lands" existing prior to the dates of the releases, and should have been paid by the defendant under

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its agreement. The defendant, on the other hand, claims that the taxes did not become taxes upon the lands within the meaning of the reservation clause in the deed until December in each year, when the clerk of the town delivered the tax roll and warrant to the town treasurer under the provisions of sec. 1081, Stats. 1898.

The trial court adopted the plaintiff's view of the meaning of the agreement, but we think the defendant's view is correct. It is simply a question of construction of language. The language is as follows: "the grantor to pay all taxes upon the lands upon which the timber is reserved until it shall give written release of said timber." It seems to us that the natural meaning of this language is that the grantor is to pay all taxes which have reached definite shape as a lien upon the lands by extension upon the tax roll prior to the release. It could hardly have been the intention of the parties that the grantor was to pay taxes the amount of which had not yet been ascertained and which could not be paid to any officer prior to the release. It is true that taxes are levied in gross upon the entire property of the town months before the warrant is delivered to the treasurer, but they do not become a specific lien or charge upon any parcel of land until they have been extended upon the tax roll and the warrant of collection has been issued. *Spear v. Door Co.* 65 Wis. 298, 27 N. W. 60. The statute does not consider them as liens upon the land until the date of the warrant. Stats. 1898, sec. 1153.

We think it very clear that the parties intended by their agreement that the grantor should pay all taxes which had become liens upon the land so that they could be paid prior to the release, and none others.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the complaint.

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STATE EX REL. EDWARD HINES LUMBER COMPANY, Respondent, vs. FISHER, City Clerk, Appellant.

May 9—June 21, 1906.

Taxation: Board of review: Increase of assessment: Jurisdictional errors: Judicial review: Evidence: Logs and lumber.

1. Judicial review of the action of a board of review in increasing an assessment extends only to the correction of jurisdictional errors, not mere errors of judgment as to the preponderance of the evidence.
2. Where the board of review had jurisdiction of the subject matter of increasing an assessment, and in making the increase acted upon evidence which, in any reasonable view thereof, justified its decision, it did not commit any jurisdictional error.
3. In this case the decision of the board of review, in increasing the amount assessed to a corporation upon logs and lumber, is *held* to be warranted by evidence as to their value and showing that portions of the lumber, claimed to have been sold prior to May 1, remained in possession of the corporation as agent and were therefore assessable to it under sec. 1044, Stats. 1898.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an appeal from a judgment in *certiorari* proceedings to review the action of the board of review of the city of Ashland.

The evidence appearing by the record in substance and effect is as follows:

For the year 1903 the assessor of the city of Ashland assessed to respondent as its property in such city liable to taxation on the 1st day of May of that year:

18,145,000 feet of lumber	valued at	$255,956 00
18,000,000 feet of logs	" "	144,000 00
7,925,000 pieces of lath	" "	11,581 00
Boom sticks	" "	1,200 00
Total		$412,737 00

September 16, 1903, respondent applied to the board of review of said city for a reduction of such assessment, claim-

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ing the same to be excessive both as to the amount of property and rate of valuation. In support thereof it made proof that of the lumber and lath so assessed and which was in fact in the lumber yard and on the docks used by it May 1, 1903, it theretofore sold and passed the title to 4,775,000 feet to White River Lumber Company for the sum of $65,815.50 and sold and passed title to 5,700,502 feet to John E. Burns Lumber Company for $95,687.56; that the total amount of lumber on the docks and in the yard was 17,600,000 feet, leaving 7,124,500 feet unsold; that the amount of its logs at the time aforesaid was 9,957,089 feet; that there were no boom sticks, and that of the total value of lath, $11,581, $5,820 was included in the two sales aforesaid, leaving on hand lath of the value of $5,761. There was evidence that the logs were worth $8 per thousand feet. It was conceded that the unsold lumber was worth on the average $14.11 per thousand, or $100,519.64. There was further evidence showing or tending to show that the entire amount of logs delivered in Ashland during the preceding logging season, the property of respondent, was 19,885,140 feet, out of which lumber was manufactured prior to May 1, 1903, to the amount of 9,928,051 feet. Upon such state of the case the assessment was reduced by the board of review as follows:

7,124,500 feet of lumber	$100,533 00
9,957,089 feet of logs	79,656 00
Lath	5,761 00
Total	$185,950 00

In this it was assumed that the lumber corresponded in feet to an equivalent in log scale.

Proceedings were thereafter had before the board of review to determine whether the lumber thus omitted from the assessment should be assessed to the owner of the yard and docks where the same was located on the 1st day of May, 1903, because of such owner being in possession of the property as agent. Numerous witnesses were sworn and gave tes-

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timony, including the owner of the dock, the proprietors, or some of them, of the mill where the lumber was sawed, the person who attended to shipping the lumber, sold as aforesaid, subsequent to May 1, 1903, and the manager of the respondent's business at Ashland. The evidence tended to show that the sold lumber was on the docks and in the yards at Ashland on May 1, 1903, the same as when it was sold a few days prior thereto; that no change occurred between the time of the sale and such 1st day of May, except the piles of lumber sold were appropriately marked. The yards and docks were under the absolute control of respondent. It permitted the owners of the sold lumber to leave the same there till such time as they desired to ship the property to the trade. Respondent exercised exclusive control over the docks after the sale and as before. It informed parties under orders to load any of the lumber where it was located. When lumber was shipped out, the person having charge of the inspection and shipment after doing his work reported to respondent. The respondent resold a considerable portion of the lumber. The persons who manufactured the lumber and owned the yards and docks did not have anything to do with the lumber after the sawing was done and the product was piled in the yards. The owners of the docks gave respondent full control thereof and it exercised such control. The lumber scale usually overran the log scale from twenty to thirty-three per cent.

As a result of such showing the board adopted a resolution to the effect that it was intended to increase the assessment of property to respondent to the following: $256,216.81 on lumber; $103,056 on logs; $11,581 on lath; making in all $370,853.81; and that written notice thereof should be served on respondent specifying a time and place for it to appear and show cause, if any existed, why such increase should not be made. Notice was given accordingly. In due time it appeared before the board by its attorney and manager and submitted to further proceedings in regard to the assessment with

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the understanding that all evidence taken prior thereto should be considered. The condition was tacitly agreed to and the hearing proceeded. The new evidence given was substantially all by respondent's manager. He testified, in effect, that for the sawing season previous to the one during which the lumber in question was manufactured the lumber scale did not overrun the log scale; that after the lumber described in the bills of sale was sold, respondent did not do anything therewith unless requested to, and that the witness did not himself know of any request being made; that respondent would have changed numbers on piles of lumber if requested to do so by the owners, but that no such request was made. The testimony before given that the docks and piling yards where the lumber was located were under control of respondent and that it gave the necessary directions to the estimator and shipper when the lumber was moved was not denied.

At the close of the testimony the assessment of property to respondent was raised in accordance with the previously declared intention. A writ of *certiorari* was thereupon sued out of the circuit court for Ashland county to review such action. The hearing in such court resulted in a decision that such action was without evidence, and contrary to evidence submitted by the relator, and without jurisdiction. From the judgment accordingly entered this appeal was taken.

F. J. Colignon, for the appellant.

For the respondent the cause was submitted on the brief of *Lamoreux & Shea.*

MARSHALL, J. The law is too well settled to warrant more being said in respect thereto than to suggest that if the board of review had jurisdiction of the subject matter, by having taken the proper proceedings to justify considering the matter of whether the assessment of property to the respondent should be increased, and if, in making the increase, it acted on evidence which in any reasonable view thereof justified

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its decision, it did not commit any jurisdictional error and the judgment of the trial court reversing its action is erroneous. It was not competent for such court to weigh the evidence upon which the board acted and determine the matter in controversy according to the judicial idea of the preponderance of such evidence. The judicial review, as indicated, only extended to correcting jurisdictional errors. That did not include, of course, mere errors of judgment as to the preponderance of the evidence. *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *State ex rel. Vilas v. Wharton,* 117 Wis. 558, 94 N. W. 359; *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048; *State ex rel. J. S. Stearns L. Co. v. Fisher,* 124 Wis. 271, 102 N. W. 566.

There is no question raised but what the board had jurisdiction of the subject matter of reviewing the assessment. Therefore, if it committed jurisdictional error in reaching a determination it was by acting without any credible evidence warranting the same. As we look at the record, the substance of which is fairly epitomized in the statement, it seems that the learned trial court could not have reached the result now complained of, fully appreciating the narrow scope of its proper view as before indicated. If it were not for the statement in the court's decision that the determination of the board was not only contrary to the evidence but without jurisdiction, we could not well escape the conclusion that it was supposed that a review of the evidence and a decision in accordance with the preponderance thereof was permissible. Looking at the court's conclusion and the evidence, it seems that either it did not have the latter clearly in mind when the former was pronounced, or, mistaking the law, it came to a conclusion by weighing the evidence and determining the preponderance thereof, and then made the further mistake of signing a decision prepared by counsel, consistent with the view that there was no credible evidence warranting the action of the board.

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What has been said, it seems, is amply borne out by the statement preceding this opinion. The amount of logs as at first assessed was determined by deducting the lumber scale from the log scale, on the theory that the one would only be equivalent to the other. The scale of respondent's logs which it attempted to account for in lumber on hand, sold and unsold, and logs was 19,885,140 feet. The amount of lumber manufactured therefrom prior to the 1st day of May, 1903, was 9,928,051 feet. The latter being deducted from the former left 9,957,089 feet, which was taken in the first instance as the amount of logs on hand on the 1st day of May, 1903. Such amount was accordingly assessed to respondent at $8 a thousand, there being testimony that they were worth that amount. That made the value of the logs $79,656.71. When the board came to the final conclusion there was proof before it that saw logs, customarily, yield from twenty to thirty-three per cent. more board measure in lumber than the log scale. Manifestly it was competent for the board to regard that evidence as credible and to determine the amount of respondent's logs on the 1st day of May, 1903, accordingly, which appears to have been done. That accounts fully for the increase in the assessment for logs over the original $79,656.71.

There was ample evidence to warrant the board in coming to the conclusion that the lumber included in the two sales made shortly before May 1, 1903, on that date was still in respondent's possession as agent for the owners and therefore was assessable to it. We will not here recite the evidence on this point. It is sufficiently shown by the statement. If the so-called sold lumber was in respondent's possession as agent on the 1st day of May, 1903, it was assessable to it the same as if it were then the owner. Sec. 1044, Stats. 1898. It seems quite plain that the board, regarding the law as stated, and properly believing from the evidence that respondent, May 1, 1903, was in possession of the lumber as agent, assessed the

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same to it, and not upon the theory suggested in the brief of respondent's counsel that the bills of sale were fictitious. The lumber was valued by the board at the price for which the same was sold. The evidence of actual sale price of the lumber, supported as it was by evidence showing that the lumber was well worth such sale price, amply warranted the board in taking such price as the fair assessable value. What has been said with reference to the lumber of course includes the lath, and thus the entire action of the board is fully justified so far as any jurisdictional error is concerned.

By the Court.—The judgment is reversed, and the cause is remanded with directions to affirm the decision of the board of review.

ASHLAND COUNTY, Appellant, vs. KNIGHT and others, Executors, etc., Respondents.

May 9—June 21, 1906.

Taxation: Re-assessment where prior assessment set aside: Assessment to agent not in possession.

1. Sec. 1059, Stats. 1898, as amended by ch. 50, Laws of 1899, does not authorize re-assessment, in a subsequent year, of property which was assessed and entered upon the tax roll for the year in which it should have been taxed, and where such prior assessment has been set aside or determined to be illegal and void.
2. Personal property cannot lawfully be re-assessed to an agent to whom it never belonged and who is not in possession of it at the time of the attempted re-assessment.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action to recover $874.50 appearing on the tax roll of the city of Ashland for the year 1903, under the following cir-

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cumstances: Upon the assessment roll in the spring of 1903 the following entry appears:

"Assessment roll. Personal Property. For the year 1903. Value of Logs, Lumber, Ties, Poles and Posts, not manufacturers' stock. Knight, Jno. H., Agt. 31,800. Value of the same as Equalized by the Board of Review, 31,800. Total value of all Personal Property 31,800. Remarks. Reassessed in accordance with opinion of Supreme Court in case of *State ex rel. Vilas v. Wharton, City Clerk.*"

As a result, the common council having levied a tax of two and three-fourths per cent. upon all property in said city, the amount of $874.50 was carried out against John H. Knight, agent, on the tax roll for that year. Knight died August 22, 1903, a resident of the city of Ashland. The property upon which this assessment and levy were attempted to be based was a part of the same property included in the tax roll for the year 1901, under the name of Vilas & Knight, the assessment of which was held invalid upon *certiorari. State ex rel. Vilas v. Wharton,* 117 Wis. 558, 94 N. W. 359. All such property had been sold on or about May 1, 1901, and had been removed from Ashland that year and had not been in the possession of Knight as agent or otherwise since that time. Prior to May 1, 1901, it had been the property of William F. Vilas, not a resident of Ashland, but resident at Madison, in this state, and at no time after April, 1903, had Knight been in any respect agent for or representative of William F. Vilas, in connection with lumbering business or lumber in Ashland; nor had he in his possession or under his control, as agent of Vilas, any personal property whatever upon the 1st day of May, 1903; nor on the same date did William F. Vilas own or have any personal property within Ashland. The court found that the assessment above quoted was an attempt to re-assess against John H. Knight, as agent, 2,650,000 feet of lumber constituting a portion of the 9,350,000 feet which had been assessed

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against Knight & Vilas in 1901, and was passed upon by the decision of this court above mentioned.

A claim having been presented against the estate of Knight in the county court and disallowed, and appeal taken to the circuit court, findings were then made substantially to the foregoing effect, whereupon the court held the assessment not to be a legal assessment or re-assessment, and to have been without authority and void, and accordingly entered judgment dismissing the claim, from which the plaintiff appeals.

For the appellant there was a brief by *M. E. Dillon,* attorney, and *Dillon & Colignon,* of counsel, and oral argument by *F. J. Colignon.*

Joseph E. Davies, for the respondents.

DODGE, J. The judgment dismissing the complaint in this action is correct for two reasons: First. Sec. 1059, Stats. 1898, upon which plaintiff relies, confers no authority to re-assess, in a subsequent year, property which was assessed and entered upon the tax roll for the year in which it should have been taxed, and where the said prior assessment or tax has been set aside or determined to be illegal or void. The authority to re-assess real or personal property is given by sec. 1059 only when such property is "omitted from assessment . . . by mistake or inadvertence." That the legislators did not mean by this expression to include a situation such as above described and as presented in this case is rendered certain by the accompanying sec. 1087, Stats. 1898, which provides expressly for such a situation. The latter section has not been extended to personal property of this character, though in effect made applicable to some other kinds by ch. 351, Laws of 1899, enacting sec. 1087*a*.

A second reason why the present tax cannot be collected from the estate of John H. Knight, deceased, is that the property is not shown to have belonged to him either in the year

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1901, when the tax upon it was held void, or at any other time, and it is made to appear affirmatively that such property was not in his possession in 1903, when it was attempted to be re-assessed. We search in vain for any suggestion in the statutes that a tax can be levied against any person other than the owner, except when he is in possession of the property either as agent or trustee. Neither of the two sections (secs. 1040, 1044, Stats. 1898) which recognize possession of property by an agent in this state as a ground for assessment in his name, and levy of a tax against him, suggests that such assessment or levy is authorized in the absence of possession at the time of such acts. The contrary, in an analogous situation, is clearly intimated in *Fond du Lac v. Estate of Otto,* 113 Wis. 39, 88 N. W. 917, and would seem to be a necessary view, when we consider that the collection of a tax from one not the owner of the property would be a pretty clear taking of property without due process of law, unless, by reason of his possession thereof or some other equally effective circumstance, he were able to reimburse himself out of the property. None of the reasons can be invoked which justified the construction placed upon sec. 1059, as amended by ch. 50, Laws of 1899, in *State ex rel. Davis & S. L. Co. v. Pors,* 107 Wis. 420, 83 N. W. 706, where a re-assessment was sustained against the owner, although he had parted with the property before re-assessment, on the ground that his ownership the preceding year placed upon him such an obligation to pay a proportionate share of the taxes of the town as to warrant the legislature in directing re-assessment, levy, and collection of such taxes in a subsequent year merely in enforcement of that obligation.

By the Court.—Judgment affirmed.

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EMERSON and another, Respondents, vs. McDONNELL and another, Appellants.

May 9—June 21, 1906.

Champerty: Attorneys at law: Purchase of clients' interest in lands in suit: Striking out defenses: Settlement: Ratification.

1. A finding of the trial court that one who negotiated for and obtained from defendants a transfer of their interest in the lands in suit was at the time defendants' attorney, is *held* to be sustained by the evidence.
2. After action brought by the grantees in a tax deed to bar the original owners from any interest in the lands, a purchase by defendants' attorney of his clients' interest in the lands was champertous, and the court properly struck out defenses interposed by him for his own benefit, though in the name of the defendants, and held that defendants were in default.
3. Where in such case defendants' attorney had, by arrangement with plaintiffs' attorney, deposited money with the latter to redeem the lands and thus establish the title and interest which he had secured from his clients, no ratification by the plaintiffs of such arrangement would validate the champertous transfer.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

An action under the statute, based on a tax deed, to bar the defendants, as original owners, from having any right or interest in the lands included in the "tax deed." The action was tried by the court and on April 29, 1905, it made its findings of facts upon the questions litigated. The findings material to the questions presented on this appeal are in substance as follows:

On June 6, 1899, Ashland county conveyed the lands in question to the plaintiffs by tax deed. This deed is in due form, properly executed, acknowledged, and duly recorded on that day. This action was commenced July 28, 1899, by the service of the summons and complaint on the defendant *Mc-*

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Donnell, who, with the defendant *Irvine,* owned the land in copartnership, and who had authority to act for both defendants in respect to the matter and to employ counsel in this action. Rusk & Hartwell were retained as attorneys for the defendants, and on August 15, 1899, at the direction and by authority of the defendant *McDonnell,* they retained and employed A. W. McLeod, a duly admitted and practicing attorney at Washburn, Wisconsin, as attorney in this action. On August 16, 1899, A. W. McLeod, under such retainer and employment, served a notice of his appearance in the case on Cate, Sanborn, Lamoreux & Park, then the plaintiffs' attorneys, and made an agreement for an extension of time for the service of an answer in the case. The defendants, through their attorneys, Rusk & Hartwell of Chippewa Falls, Wisconsin, negotiated with Cate, Sanborn, Lamoreux & Park for a settlement of the action and for a transfer of defendants' interest in the lands to plaintiffs. About August 3, 1899, and after the time when such negotiations were commenced, A. W. McLeod negotiated and bargained with defendants for the purchase of defendants' interest in the lands, and on September 5, 1899, obtained a contract from them for the sale of their interests at the rate of $5 per forty-acre tract. The lands were then reasonably of the value of from $4 to $5 per acre. A. W. McLeod was well informed of the market value of these lands and knew that they were wild and unoccupied. On September 15, 1899, the defendants, pursuant to the contract, conveyed all their interest in these lands by quitclaim deed, which deed was duly recorded November 11, 1899. After delivery of this deed and the transfer of defendants' interest in the lands, A. W. McLeod, although he had no authority to further appear for and represent these defendants in this action, thereafter obtained a further extension of time, answered in the action, and for his benefit and that of the Washburn Land Company, his grantee, litigated, at his expense, the issues raised by the pleadings. On October 30, 1899, he deposited

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with Cate, Sanborn, Lamoreux & Park the sum of $806.15, the amount due for taxes, interest, and charges for redemption if the tax deeds and sales were illegal. The money was so deposited in his own behalf, without authority from the defendants, and for his own benefit. No equivalent deposit was made with the clerk of the circuit court. The court found that plaintiffs' attorneys had been given no authority to settle or compromise the action or to elect to receive or take any sum deposited with the clerk of the court for redemption of such lands from tax sales and deeds; that plaintiffs had no knowledge until after March 24, 1903, that any such deposit had been made by A. W. McLeod with their attorneys, but that they had theretofore been informed that no money had been deposited with their attorneys or offered to be paid them on account of these lands and the tax sales unless they should quitclaim to A. W. McLeod. This they always refused to do, and they have never received any money on account thereof from any person. Notice of *lis pendens* in this action was filed in the register of deeds' office on September 22, 1899, and the Washburn Land Company, of which A. W. McLeod was president, had actual notice of the litigation affecting the title to this land.

The court held that the purchase by A. W. McLeod of defendants' interest and title to these lands, during the pendency of this action and during his retainer and employment as their attorney of record and while negotiations for settlement were being had between the plaintiffs and the defendants, was champertous and void, and for that reason struck out all defenses interposed by him in the action, and held that defendants were in default. Judgment was awarded to plaintiffs on the merits, as prayed for in their complaint, with costs. The court also denied a motion by defendants, made after the trial on the merits and before judgment, for leave to adduce additional evidence pertinent to the question of champerty. This is an appeal from such judgment.

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For the appellants there were briefs by *A. W. McLeod* and *W. M. Tomkins,* and oral argument by *Mr. Tomkins.*

For the respondents there was a brief by *James O'Leary,* attorney, and *Reid, Smart & Curtis,* of counsel, and oral argument by *Mr. O'Leary* and *Mr. A. H. Reid.*

SIEBECKER, J. The court's findings are assailed as not warranted by the evidence in several respects. It is asserted that the evidence does not sustain the court's conclusion that A. W. McLeod had been retained and employed as defendants' attorney on September 5, 1899, when he bargained with them for the lands in controversy and when, shortly after, they were transferred to him at a price much less than their actual value. This contention is at variance with an affidavit made by McLeod to the effect that he was retained and employed for the defense and that he had accepted such employment and had given notice thereof to plaintiffs' attorneys, and under it secured an extension of time to answer. The defendant *McDonnell* and his attorney, Mr. Rusk, corroborate this statement in their affidavits, and the court found in the proceeding on the motion then before it that McLeod had been so retained and employed and thereon awarded the relief demanded. The facts and circumstances of the transaction, bearing on this question, tend to support the court's conclusion from the evidence, in finding that he was acting as their attorney at the time he bargained for the purchase of the lands involved in this litigation and when he thereafter took a transfer of their title to and interest in them. It is insisted that the fact of his receiving no compensation for his services is of much weight as showing that his appearance was merely formal and an accommodation to their regularly retained attorneys. This, however, cannot be held of controlling significance, for in the subsequent purchase of the lands such a claim would naturally be included and discharged. The evidence tending to support the court's finding upon this issue is suffi-

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ciently clear to sustain the court's conclusion, and refutes the claim that it was contrary to the clear preponderance of the evidence.

The court apparently extended to defendants' attorney every opportunity to present the transaction in all its phases and to relieve it from the taint of champerty, and to this end made supplemental findings at his request. After full consideration of the facts it was manifestly constrained to hold that the case presented a situation which showed that defendants' attorney had transgressed the bounds of the law which prohibits attorneys from purchasing from their clients the subjects of pending litigation. The purpose of the law in condemning such transactions was aptly stated in *Miles v. Mutual R. F. L. Asso.* 108 Wis. 421, 433, 84 N. W. 159, and is that:

"The real mischief which the law of champerty aims to prevent is that of encouraging litigation by persons who have no interest therein independent of that to be derived from carrying it on in whole or in part at their expense. That vice exists where an attorney purchases the claim of his client in suit with the intent to thereafter carry on the litigation at his own expense and for his own benefit, the same as where he agrees to carry on litigation at his own expense . . . in the name of another."

Under the circumstances disclosed upon the trial it devolved on the court to apply this principle of the law by declaring the transfer to defendants' attorney void and by denying him the benefit of any defense he sought to invoke. It is a well-established practice that judicial tribunals will refuse to aid in the enforcement of a contract which the law condemns as against public policy, and the merits of the claim cannot be invoked to purge the transaction from the taint of champerty. *Barker v. Barker,* 14 Wis. 131. It is plain that the defendants took no part in nor authorized the defense which was in fact interposed in the action, and that it was in fact made by McLeod for his own benefit. These considera-

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tions dispose of all the questions now urged for reversal of the judgment upon the ground that the defendants were not in default and that the judgment upon the merits should go in their favor.

It is claimed also that plaintiffs ratified the arrangement between McLeod and plaintiffs' attorneys for the redemption of the lands from all tax sales and deeds, pursuant to which Mr. McLeod deposited with the attorneys a sum sufficient to pay all taxes, interest, and charges which had accrued thereon. Whether plaintiffs' attorneys had authority for making such an agreement or whether plaintiffs' acts in respect thereto could be a ratification of it under other circumstances need not be considered, since it is established, as found by the court, that this arrangement was made by McLeod upon his individual responsibility and for his benefit and interest only, and that the money so deposited by him with plaintiffs' attorneys was for the purpose of establishing the title and interest which he had secured from defendants by the champertous transfer. It requires no argument to show that this void transfer cannot be made valid through such a course of action by the interested party. There was no valid contract of sale to him and hence there could be no ratification.

We discover no error in the court's refusal to reopen the case after trial and to receive additional evidence. The court considered the proffered letter as in evidence and it has been so considered here. It appears by the record that plaintiffs' tax deed is in due form and properly executed, witnessed, and acknowledged. This makes it presumptive evidence of the sufficiency of the tax proceedings and the transfer of the title to the lands described in it to plaintiffs, and entitles them to a judgment upon the record establishing such title and barring the original owners and all persons claiming under them from all right, title, or interest in the lands described in the complaint.

By the Court.—Judgment affirmed.

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WASHBURN WATER WORKS COMPANY, Respondent, vs. CITY OF WASHBURN, Appellant.

May 9—June 21, 1906.

Municipal corporations: Waterworks: Contract to pay hydrant rentals: Liability of city as successor of town.

For the benefit of the inhabitants of an unincorporated village therein a town passed an ordinance granting to plaintiff's assignors a franchise for the construction of waterworks in said village and contracting to pay certain hydrant rentals, etc. The waterworks plant was constructed by plaintiff wholly within the limits of the village. Afterwards the village became incorporated as a city, and plaintiff continued to furnish water to the city and its inhabitants under the terms of the ordinance contract, all parties acting upon the assumption that the city had succeeded to all the rights and liabilities of the town thereunder. The town thereafter was not concerned in the waterworks property, exercised no supervision over it, and derived no benefit from it. *Held*, that the city was bound by the ordinance contract as the successor of the town.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The plaintiff in this action presented its claim to the common council of the city of *Washburn,* defendant, for $5,300, claimed to be due for the year ending January 1, 1905. The claim was allowed at $852, and an appeal taken by plaintiff to the circuit court. The court directed that formal pleadings be made, which was done.

The complaint alleges, in effect, the corporate existence of the plaintiff, and that defendant is one of the duly organized cities of the county of Bayfield, Wisconsin; that prior to the 6th day of May, 1889, the town of Washburn contained the unincorporated village of Washburn with more than 1,000 inhabitants, and that the electors of said town at the annual meeting prior to the 6th day of May, 1889, conferred upon the town and town board all powers relating to villages and

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conferred upon village boards by ch. 40, R. S. 1878; that on May 6, 1889, the town board of the town of Washburn duly passed and published an ordinance for the construction of waterworks in said town for the purpose of obtaining a water supply, and with all the necessary machinery and attachments to supply the town and its inhabitants with water suitable for fire and domestic purposes, and empowered Lewis & Maxcy, grantees in said ordinance, their representatives and assigns, to construct the same and occupy the streets of said village of Washburn and town of Washburn in said county of Bayfield for such purposes, and agreed to and did rent hydrants from said grantees or their assigns for a term of years, and agreed to pay an annual rent of $4,000 in semi-annual instalments therefor, together with town and municipal taxes which might be assessed against the grantees or their assigns for the first ten years, the town reserving the right at the expiration of a term of years to purchase the works from said grantees or their assigns, together with extension rights and franchises; that the plaintiff duly succeeded to the rights of Lewis & Maxcy under said ordinance with said town of Washburn and constructed the works in the unincorporated village of Washburn; that in April, 1904, the inhabitants of the unincorporated village of Washburn voted to incorporate a city under the general laws of the state, and a charter was duly issued and the territory comprising the unincorporated village of Washburn became a city of the fourth class known as the city of *Washburn,* defendant in this action; that, ever since the organization of the city of *Washburn,* the plaintiff has continued to supply defendant with water under the terms of the ordinance, and that the amount due for supplying water under said ordinance to July 1, 1904, is $2,650, and to January 1, 1905, $2,650, which sum was due January 1, 1905, and that the city became indebted to the plaintiff for said sum; that at all times since the incorporation of the city the officers thereof and the plaintiff have assumed that the relations be-

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tween them were governed by the terms of said ordinance, and that the city assumed all the rights and privileges of the town of Washburn and recognized and acquiesced in the rights of the plaintiff thereunder, and that by reason of the actions of the city and its officers there has been a novation of the said ordinance, and that the city is estopped from denying the existence of the contract with the plaintiff.

The defendant answered, admitting the corporate existence of the plaintiff and defendant, as well as the corporate existence of the town of Washburn, and that the town of Washburn contained the unincorporated village of Washburn, having more than 1,000 inhabitants, and that the electors conferred on the town board the powers conferred on village boards; also admitting that the ordinance referred to in the complaint was adopted and published, and that the plaintiff constructed its waterworks system wholly within the limits of the unincorporated village of Washburn, and has operated the same since October, 1889, and that the population of the city of *Washburn* is about 5,000 and that of the town of Washburn about 500, and that about fifty-five per cent. of the value of the property in the old town of Washburn is now situate in the city of *Washburn*. Defendant further set up a counterclaim to the effect that on the 18th day of July, 1904, the town of Washburn recovered a judgment for delinquent personal property tax against the plaintiff in the sum of $2,310, which has not been paid, and that fifty-five per cent. thereof belonged to the defendant, and that plaintiff is indebted to the defendant in the sum of $1,969.60 for taxes due defendant for the year 1904, and that in 1904 the town of Washburn recovered a judgment against the plaintiff in the supreme court for the sum of $52, no part of which has been paid, fifty-five per cent. of which belonged to defendant, and demanded judgment on said counterclaim against plaintiff for $4,331.60, with interest and costs.

The case was tried by the court and a jury in May, 1905.

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The court submitted to the jury the question of the reasonable rental value of the hydrants for the year 1904, and the jury found the same to be $4,940. The court found as follows:

Findings of fact: That the number of hydrants used by defendant is as alleged in the complaint. That since the organization of the defendant as a city the plaintiff has continued to supply water to the city and the inhabitants thereof, under the terms of the ordinance and contract, set forth in the complaint, and the same has been used by such city. That, at all times since the incorporation of said city, said city and the officers thereof and the plaintiff herein have treated and assumed that the relations between plaintiff and defendant were wholly governed by the terms of the ordinance, and that the city succeeded to all the rights of the town under said ordinance, also all liabilities thereunder from and after the date of its incorporation. That said city has assumed all the rights and privileges of the town of Washburn under the ordinance set forth in the complaint. That the said city has recognized and acquiesced in all the rights of the plaintiff under the ordinance set forth in the complaint. That the plaintiff furnished water to the defendant under the terms of said ordinance for the months of May and June in the year 1904, and for the succeeding six months until January 1, 1905. That the population of the city of *Washburn* at the time of its incorporation was 5,000, and that the population of the town of Washburn at the time of the incorporation of said city was 500. That the valuation of the property included in the city of *Washburn* is fifty-five per cent. of the value of the property in the old town of Washburn, and that the value of the property in the present town of Washburn is twenty-nine per cent. of the valuation of the property of the old town of Washburn. That there was assessed against and is now due the defendant from the plaintiff for taxes in the year of 1904, on its plant and franchise, the sum of $1,969.60. That the plaintiff's waterworks system is wholly constructed within the city of

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Washburn, and that it is impossible for plaintiff to supply water to the town of Washburn. That the town of Washburn is mostly inhabited by farmers and is sparsely populated, and includes five government townships.

Conclusions of law: That the city of *Washburn* assumed the ordinance set forth in the complaint, and that the same is a valid contract subsisting between plaintiff and defendant, from the time of the organization of the city of *Washburn.* That the defendant became indebted to the plaintiff by reason of the furnishing and supplying of water under the terms of said ordinance in the sum of $3,533.35. That there should be set off against said sum the taxes due the city of *Washburn* for the year 1904, to wit, $1,969.60. That plaintiff is entitled to recover from defendant the sum of $1,563.75, with costs.

Counsel for defendant excepted to the findings of fact and conclusions of law and to the order directing judgment. Judgment was entered in favor of the plaintiff for the sum of $1,563.75 damages, together with costs, from which this appeal is taken.

John Walsh and *W. M. Tomkins,* for the appellant.

A. W. McLeod, for the respondent.

KERWIN, J. The material facts in this case are covered by the findings heretofore stated. The controlling questions involved are: (1) Whether the defendant city assumed the contract of the town with the plaintiff; and (2) whether fifty-five per cent. of the judgment in favor of the town and against the plaintiff should be set off against the claim made for hydrant rentals. As appears from the findings of fact, the contract of the plaintiff with the town was in fact for the benefit of the inhabitants of the unincorporated village which afterwards became the incorporated city of *Washburn,* defendant in this action; the waterworks plant was constructed wholly within the territory comprising the city of *Washburn,* and

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since its incorporation plaintiff has continued to furnish it and its inhabitants with water according to contract, the town deriving no benefit whatever from the waterworks plant; the city of *Washburn* and its officers and the plaintiff have assumed that the relations between plaintiff and defendant were governed by the terms of the ordinance, and that the city succeeded to all the rights and liabilities of the town under such ordinance from and after the date of the incorporation of defendant; at the time of incorporation the population of the city of *Washburn* was 5,000 and that of the town 500; and the valuation of the property of the city of *Washburn* was greater than the valuation of the property in the town.

It is claimed, however, by appellant that, the contract being with the town, the city did not become liable upon it, on the ground that, when the territory embraced within the limits of the defendant city became detached from the town and formed into a separate municipality, no liability followed the new creation. The case made here is not within the rule contended for by the appellant. No part of the waterworks plant remained in the town after the incorporation of the defendant. The town had no supervision over it, nor was it in any manner interested in it. It was retained, managed, and controlled solely for the benefit of the city and wholly within its limits. It was constructed for the benefit of the inhabitants of the unincorporated village of Washburn, and afterwards continued for the benefit of such inhabitants under their organization as the city of *Washburn*. The appellant does not, as we understand his position, contend that the town is still liable, or that the plaintiff's claim could be enforced against the town; but it is insisted that the case is one where by operation of law it has become impossible for the parties to the water contract to perform, and that, where performance of a contract becomes wholly or in part impossible by reason of change in the law, the contract is to that extent discharged. We think it very clear that the contract has not been extinguished or ren-

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dered incapable of performance, but is still a valid, subsisting obligation, and the question here is whether it is enforceable against the defendant. While it was made in form with the town, it was in fact made for the benefit of the inhabitants of the unincorporated village situate within the limits of the town, and continued to be performed under the supervision of the town, for the benefit of such village, until the incorporation of the defendant city. The city of *Washburn* and its inhabitants are solely benefited by the supply of water. They alone are interested in the execution of the contract; they alone receive the benefits and should in equity and good conscience bear the burdens. *National F. & P. Works v. Oconto City W. S. Co.* 105 Wis. 48, 81 N. W. 125; *Mount Pleasant v. Beckwith,* 100 U. S. 514. It is not necessary to decide here, and we do not decide, whether the town remains liable upon the contract.

The history of legislation on this subject, we think, clearly shows that it was the intention of the legislature that cities incorporated under the established facts in this case should succeed to the rights, privileges, and liabilities of such contracts. Ch. 292, Laws of 1883, confers upon town boards in towns containing one or more unincorporated villages, having each a population of not less than 1,000, the powers relating to villages and conferred upon village boards by the provisions of ch. 40, R. S. 1878, and acts amendatory thereof, excepting those the exercise of which would conflict with the provision of law relating to towns and town boards, and makes them applicable to such unincorporated village or villages in such town, and may be exercised when directed by a resolution of the qualified electors of the town. The power to make the contract in question was conferred upon the town because it contained an unincorporated village of not less than 1,000 inhabitants, and obviously for the purpose of giving the unincorporated village within the limits of the town the same advantages as an incorporated village; the needs and neces-

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sities of such unincorporated village necessarily requiring the exercise of governmental powers somewhat different from the ordinary township community, especially in regard to police regulations, facilities for the extinguishment of fires, and care and improvement of streets. *Land, L. & L. Co. v. Brown*, 73 Wis. 294, 40 N. W. 482. A franchise or contract to construct waterworks can be conferred only through authority delegated from the state. *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181. It is *quasi*-public in its nature. *State ex rel. Att'y Gen. v. Janesville W. Co.* 92 Wis. 496, 66 N. W. 512. Sec. 925—8, Stats. 1898, regarding the incorporation of cities, provides, among other things, that 100 or more electors and taxpayers of any village, incorporated or unincorporated, may apply by petition to the trustees of said village or to the proper town board to have the question of incorporating said village, or the same and adjacent territory, containing together a population of not less than 1,500, as a city, submitted to a vote of the electors of the territory described in the petition. Subsequent sections provide for the submission of the question of incorporation to a vote of the electors residing within the limits proposed and for the perfecting of such incorporation. The legislative scheme, therefore, obviously was to give unincorporated villages the right to secure and maintain waterworks within their limits under the supervision of the town board, the same as incorporated villages under village boards. The legislature doubtless had in view that the unincorporated village would form a nucleus for an incorporated village or city, and that waterworks constructed by contract under such legislative authority for the benefit of inhabitants of an unincorporated village should pass to the village or city organized by such inhabitants in the manner provided by statute.

It is contended on the part of the appellant that at common law, upon division of a town, whether by creating a new town or a city out of a part of the old town, the old town retained

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all the property and was liable for all indebtedness. But the power to divide municipalities is strictly a legislative power, and the power to prescribe the rule by which a division of the property of the old municipality shall be made is incident to the power to make such division, and is in its nature legislative. Such division must rest upon the circumstances of each case. *Bristol v. New Chester,* 3 N. H. 524; *Laramie Co. v. Albany Co.* 92 U. S. 307; *Knight v. Ashland,* 61 Wis. 233, 21 N. W. 65. The doctrine upon which the division of property of municipalities is founded is an equitable doctrine resting upon the relative rights of the municipalities, the character of the property to be divided, and legislative regulation upon the subject. *Bloomfield v. Glen Ridge,* 54 N. J. Eq. 276, 33 Atl. 925; *Schriber v. Langlade,* 66 Wis. 616, 29 N. W. 547, 554; *Knight v. Ashland, supra; Broughton v. Pensacola,* 93 U. S. 266.

We have been cited by counsel on either side to no case precisely in point upon the main question before us, nor have we been able after much research to find any. But we think the principle enunciated in some of the cases cited sustains the liability of the defendant upon the facts established here. As we have already seen, the contract for waterworks and the construction thereof within the limits of the unincorporated village was for the benefit of the inhabitants thereof, and continued to be after incorporation of the defendant city. In municipal corporations it is the inhabitants and the territory which form the essential elements of the corporation, and where they are the same, or substantially the same, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer the affairs of the municipality. And, in the absence of express provision to the contrary, it will be presumed that the legislature intended the liabilities as well as the rights of property of the corporation in its old form should accompany the

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corporation in its re-organization. *Broughton v. Pensacola, supra; Higginson v. Turner,* 171 Mass. 586, 51 N. E. 172. In *O'Connor v. Memphis,* 6 Lea, 730, 735, it is said:

"Neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these things combined, will destroy the identity, continuity, or succession of the corporation, if the people and territory re-incorporated constitute an integral part of the corporation abolished. The reason is to be found in the peculiar nature of such corporations. A charter for municipal purposes is an investing of the people of a place with the local government thereof, constituting an *imperium in imperio,* and the corporators and the territory are the essential elements; all else being mere incidents or forms."

And in *Mobile v. Watson,* 116 U. S. 289, 6 Sup. Ct. 398, it was held in effect that where the legislature of a state has given a local community living within the designated boundaries a municipal organization, and by subsequent acts repeals its charter and dissolves the corporation and incorporates substantially the same people under a new name for the same general purposes, and the great bulk of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new for the same public uses, the latter, though greatly reduced in corporate limits, is the successor of the former and liable for its debts. To substantially the same effect are *Mount Pleasant v. Beckwith,* 100 U. S. 514, and *Girard v. Philadelphia,* 7 Wall. 1.

We think the principle of the cases cited and many others which may be found applies here. True, the corporate existence of the town continued after the organization of the city out of its territory. But the inhabitants of the unincorporated village, for whose benefit the contract was made, continued the inhabitants of the city. It is said by counsel for appellant that, where one corporation goes out of existence by

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being annexed to or merged in another, no arrangement being made respecting the payment of the liabilities of the former, the latter will be entitled to all the property and be responsible for the liabilities; but it is insisted that the town of Washburn has never been dissolved, hence this rule does not apply. The situation, so far as the unincorporated village of Washburn is concerned, is the same as if the town had gone out of existence by merger or otherwise, since it has no further interest in the execution of the contract. The town is not concerned in the waterworks property, and can exercise no supervision over it or derive any benefit from it, and the rights of the inhabitants of the city of *Washburn* under the ordinance, if enforced at all, must be by the defendant city as the successor of the town. *Bloomfield v. Glen Ridge*, 54 N. J. Eq. 276, 33 Atl. 925; *Curtis v. Board of Education*, 43 Kan. 138, 23 Pac. 98. The findings of fact respecting the assumption of the contract by the defendant are fully supported by the evidence. The plaintiff continued to furnish water after the incorporation, and the city received it without objection, repeatedly acknowledged the existence of the contract, acted upon it through its officers, and treated it as a valid and existing obligation between the plaintiff and defendant. We conclude that the defendant city is bound by the contract or ordinance in question.

2. Counsel for appellant further claims that fifty-five per cent. of certain judgments recovered by the town of Washburn against the plaintiff should be offset against the plaintiff's claim in this action; but they fail to point out in their briefs upon what ground the same should be made, and we are unable to discover from the record any ground which would warrant such offset. The court below obviously disregarded this claim of appellant, and we find no error in this respect.

We are of the opinion that the judgment of the court below is right and should be affirmed.

By the Court.—The judgment of the court below is affirmed.

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HODGE and another, Appellants, vs. WALLACE and others, Respondents.

May 9—June 21, 1906.

Bills and notes: Maturity caused by failure to pay interest: Subsequent transfer: Defenses: Duress: Fraud.

1. **A note providing expressly that delinquency in payment of any interest "shall cause the whole note to immediately become due and collectible," becomes due in such case absolutely, not merely at the option of the holder, and one thereafter taking the note from the payee takes it subject to the equities between the original parties.**
2. **The evidence in this case is *held* not to show that a note was executed under duress, but to be sufficient to take to the jury the question whether its execution was induced by false and fraudulent representations.**

APPEAL from a judgment of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This action was commenced March 14, 1905, to recover the amount due on three promissory notes each bearing date April 15, 1903, for $1,000, payable, respectively, July 15, 1904, July 15, 1905, and July 15, 1906, with interest at six per cent. per annum, payable to Robert Burgess & Son or order, and signed by all of the eleven defendants, and on each note there was indorsed as payment, under date of April 17, 1903, $200. Omitting the signatures and indorsements the note first due reads as follows:

"$1,000.00. Prentice, Wis., April 15th, 1903.

"On July 15th, 1904, after date for value received, we jointly and severally promise to pay Robert Burgess & Son, or order, One Thousand Dollars, at Prentice, Wis., with interest at the rate of 6 per cent. per annum from date until paid; interest payable annually. It is stipulated and agreed that if any payment or part payment hereon, or any interest, shall become due and unpaid, such delinquency shall cause the whole note to immediately become due and collectible. In signing this note I waive notice of protest and extension of time."

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Each of the other two notes reads the same except one was payable July 15, 1905, and the other July 15, 1906. The complaint alleges three causes of action, one on each of said notes, and each alleges that April 21, 1904, "the said note was, for value, duly sold, assigned, and transferred by said Robert Burgess & Son to L. J. Hodge & Son, and that thereafter and on the 3d day of May, 1904, and before the maturity of said note, the same was, for value, duly sold, assigned, and transferred to the plaintiffs herein, who thereupon became, ever since have been, and now are the lawful owners and holders thereof." The first cause of action also alleges, in effect, that the note became due July 16, 1904; that nothing had been paid thereon aside from the indorsement mentioned, and $78.19 paid by each of three of the defendants on and after said last-mentioned date, leaving due and unpaid thereon $626.82 with interest thereon from July 26, 1904, at six per cent. The second cause of action, in addition to the facts mentioned, alleges, in effect, that the annual interest in the sum of $48.02 became due and payable thereon April 15, 1904, but that no part thereof was paid except $16.35, and that by reason of the failure to pay said interest, and the terms of the note, the whole thereof became due and payable before the commencement of this action. Substantially the same allegations were made in the third cause of action.

The defendants answered by way of admissions, denials, and counter allegations to the effect that each of said notes was signed by the defendants on condition that the signature of one William Goetzke would also be affixed thereto, but which was never done, and hence that none of said instruments ever took effect as promissory notes and were never delivered; that said notes were procured from each of the defendants by false and fraudulent representations and under duress; that such signatures were procured under the fraudulent pretense that Robert Burgess & Son were selling to each of the defendants and others a share of stock in a company

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to be organized for the purpose of purchasing from them an imported, full-blooded, registered, Percheron stallion, and that each such share of stock was of the par value of $200, and that there were to be fifteen shares in all, and that each signer would become the owner of one fifteenth interest in the stallion for $200; and that such signatures were taken in a book in which no complete contract or agreement appeared; that such signatures were either attached to another leaf and fraudulently concealed or subsequently fraudulently attached to a pretended agreement to purchase such stallion, to which none of the defendants ever consented; that the obligations of each of the defendants were entirely verbal and made in reliance upon such representations; that the defendants were each induced by such duress and fraudulent representations to sign such instruments upon the assurance of Burgess & Son that no greater liability was thereby created against any of the defendants than $200; that the signature of the defendant *Clemons* to such preliminary agreement was so procured when *Clemons* was so intoxicated as not to understand the nature of his acts, and such intoxication was procured by said Burgess & Son for the purpose of obtaining such signature; that the pedigree and condition of said stallion were not as represented; that the stallion was not as warranted nor suitable for the purposes represented, as Burgess & Son then well knew, and was not worth to exceed $225; that, at the time of signing said instruments, each of the said defendants received as consideration therefor an instrument purporting to be a certificate of stock, reciting therein that the obligation of each defendant was his joint note for $200, but that the same was not a certificate of stock, and no such company had been organized, and the same was of no value; and that the consideration for said instruments totally and wholly failed, and that the plaintiff took said instruments with full knowledge of such false representations, pretenses, and warranties.

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At the close of the trial of the issues thus joined the court directed a verdict of no cause of action against the plaintiffs and in favor of the defendants, and from the judgment entered thereon with costs the plaintiffs appeal.

For the appellants there was a brief by *Barry & Barry* and *Barnes & Magoon,* and oral argument by *R. M. Barnes.* They contended, *inter alia,* that a promissory note matures only when by its terms the principal becomes due; and one who purchases it in good faith, for value, before maturity, is within the protection of the law merchant, although the interest is overdue at the time of purchase. *Kelley v. Whitney,* 45 Wis. 110; *Boss v. Hewitt,* 15 Wis. 260; *Patterson v. Wright,* 64 Wis. 289; *Cromwell v. County of Sac,* 96 U. S. 51; *Railway Co. v. Sprague,* 103 U. S. 756, 762; *Thompson v. Perrine,* 106 U. S. 589, 592. The provision as to the whole note becoming due in case of nonpayment of interest was for the benefit, not of the maker, but of the holder of the note, and means that it is to become due at his option. *Chicago R. E. Co. v. Merchants' Nat. Bank,* 136 U. S. 268. A provision in a promissory note that upon default in the payment of interest thereon for sixty days after such interest becomes due and payable, thereby the whole principal of such note should at once become absolutely due, is permissive only, and does not of itself start the running of the statute of limitations. *Blakeslee v. Hoit,* 116 Ill. App. 83, 87; *Watts v. Hoffman,* 77 Ill. App. 411; *Richardson v. Warner,* 28 Fed. 343; *Nebraska City Nat. Bank v. Nebraska City H. G. L. & C. Co.* 4 McCrary, 319; *Lowenstein v. Phelan,* 17 Neb. 429.

J. W. Hicks and *James O'Leary,* for the respondents.

Cassoday, C. J. 1. At the close of the testimony the plaintiffs moved the court to direct a verdict in their favor and against the defendants for the full amount of principal and interest mentioned in the three notes, but subsequently asked leave to withdraw such motion and to withdraw the sec-

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ond and third causes of action, and renewed their motion to direct a verdict in favor of the plaintiffs and against the defendants for the amount named in the first cause of action, which, by the express terms of the note, became due and payable several months prior to the commencement of the action. The court denied such motions and directed a verdict in favor of the defendants, and counsel for the plaintiffs assign such rulings as errors. The claim on the part of the plaintiffs is to the effect that it appears from the uncontradicted evidence that the plaintiffs became the owners and holders of each of the three notes in good faith and for value and before maturity and in the usual course of business, and hence took the same "free from any defect of title of prior parties, and free from defenses available to prior parties among themselves." Secs. 1676—22, 1676—25, 1676—27, of the Negotiable Instrument Law, ch. 356, Laws of 1899. On the other hand, it is claimed on the part of the defendants that, by virtue of the stipulation contained in each of the three notes, the whole of the principal and interest named therein became due and payable six days prior to the time when the notes were transferred by Robert Burgess & Son to L. J. Hodge & Son and nearly three weeks prior to the time when they were transferred by L. J. Hodge & Son to the plaintiffs. That stipulation is set forth in the foregoing statement and need not be here repeated. Each note required interest to be paid thereon "at the rate of six per cent. per annum from date until paid; interest payable *annually*." The stipulation is to the effect that "if any payment or part payment, . . . *or any interest" thereon,* should "become due and unpaid, such *delinquency"* should "cause the whole note to *immediately* become due and collectible."

Counsel on both sides refer to adjudications which they claim to be in support of their respective contentions. The case presented is clearly distinguishable from those where the stipulation for accelerating the maturity of the note or notes

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on nonpayment of interest or other default is contained in a mortgage or trust deed given to secure the same, and which mortgage or trust deed and notes are construed in some jurisdictions as one instrument in law. In such a case the note or notes may be transferred without the transferee having any knowledge of such stipulation in the mortgage or trust deed. Here the stipulation is in the notes themselves, and every transferee of the same necessarily took them with knowledge of such stipulation. So the case presented differs from those where one of a series of notes or an instalment of interest has become due and unpaid, with no stipulation, as here, that "such delinquency shall cause the whole note to immediately become due and collectible." Thus it was held by this court long ago:

"An indorsee of several notes of the same maker, secured by one mortgage bearing the same date, and payable to the order of the same person at different periods, is not chargeable with notice of any equitable defense of the maker against such of the notes as were not due at the time of the indorsement, by reason of the fact that one of the notes was then overdue. Nor is he chargeable with such notice by reason of the fact that the notes bore interest payable annually, and that one year's interest on all of them was due and unpaid at the time of the indorsement." *Boss v. Hewitt*, 15 Wis. 260. To the same effect: *Kelley v. Whitney*, 45 Wis. 110, 115–117; *Patterson v. Wright*, 64 Wis. 289, 292, 25 N. W. 10.

These cases do not go to the extent of supporting the contention of the plaintiffs. So the case presented is distinguishable from those where the stipulation for accelerating the maturity of the note or notes contained therein is made optional with the payee or mortgagee or his representatives or assigns. *Schoonmaker v. Taylor*, 14 Wis. 313, 316; *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417. There is nothing in any of the stipulations or notes here involved to warrant the suggestion that the payees or transferees of any one of them were thereby given such optional right to declare

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the whole note due and payable on failure to pay the annual interest which by the express terms of each note became absolutely due and payable April 15, 1904. On the contrary, it is expressly and clearly declared therein that "such delinquency *shall* cause the whole note to *immediately* become due and collectible." To construe such language as merely optional or permissive would be to destroy the clearly expressed contract which the parties made for themselves and to force upon them a contract to which neither of them ever gave his consent. The terms of the contract are so clear as to seemingly preclude construction. This may account for the small number of adjudications upon the precise point here presented.

In the absence of such express stipulation, and notwithstanding the rulings in the cases cited, it was held by this court several years ago, that "one who takes a promissory note, which shows that interest on the principal sum therein named is past due and unpaid, takes it subject to all equities between the original parties." *Hart v. Stickney*, 41 Wis. 630. That case followed *Newell v. Gregg*, 51 Barb. 263. To the same effect, *First Nat. Bank v. Forsyth*, 67 Minn. 257, 69 N. W. 909. Such ruling, however, was out of harmony with the decisions of this court already cited, and goes beyond what is necessary to sustain the contention of the defendants in this case, based on such express stipulation. In a much later case bearing upon that question this court held:

"The fact that a note bearing interest payable semi-annually was dated, executed, and delivered on a certain day fixes the date for the payment of instalments of interest at the end of every six months thereafter, and no demand was necessary to create a default." *Zautcke v. North Mil. T. Co.* 95 Wis. 21, 69 N. W. 978.

It seems to be pretty well settled that:

"If the principal of the paper is payable in instalments, the paper is considered as dishonored by the failure to pay any one instalment when it fell due, whether the entire debt became due on such a failure to pay or not, and a subsequent

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transferee takes it subject to all the equities." Tiedeman, Com. Paper, § 297; *Vinton v. King,* 4 Allen, 562; *Field v. Tibbetts,* 57 Me. 358; 2 Rand. Com. Paper (2d ed.) § 1047.

But it is said by the same author:

"It is doubtful whether the same rule applies to the failure to pay an instalment of interest, unless the parties have *stipulated* that the entire debt shall become due on the failure to pay the interest. Although it has been held that the failure to pay the interest will destroy the negotiability of the paper, with or without this stipulation, the better opinion is that, in the absence of such a stipulation, the failure to pay an instalment of interest does not affect the future negotiability of the note or bill." Id.

It was held in Massachusetts more than one hundred years ago:

"Upon a note payable in eight years with interest payable annually, an action lies for the interest before the principal is payable." *Greenleaf v. Kellogg,* 2 Mass. 568. To the same effect: *Cooley v. Rose,* 3 Mass. 221; *Walker v. Kimball,* 22 Ill. 537; *Morgenstern v. Klees,* 30 Ill. 422; *Failing v. Clemmer,* 49 Iowa, 104; *Mills v. Jefferson,* 20 Wis. 50.

It is said by Mr. Randolph:

"A municipal bond, like a bill or note, may be conditioned on default in the payment of interest, and will, in such case, mature accordingly, although by its terms the principal was not otherwise to become payable for many years. A provision of this sort—*e. g.* that a note drawing interest annually shall become due on failure to pay the interest—may be contained in a collateral deed of trust or other instrument." 2 Rand. Com. Paper (2d ed.) § 1048.

So it is said by Mr. Daniel:

"Where it is provided in the bonds themselves that, if default be made as to any interest coupon, the bonds shall be due and payable, they so become on default of payment of any coupon." 2 Daniel, Neg. Inst. (5th ed.) § 1506*a*.

Thus it has been held in Georgia:

"Municipal bonds, having on their face many years to run, but issued and put in circulation with an indorsement upon each of them to the effect that, in case default be made in pay-

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ing any of the interest coupons at maturity, then, as a part of the contract, the bond itself shall become due and payable, are legally due, as to the whole of the principal, whenever a default in paying interest according to any of the coupons occurs. Time is of the essence of the contract." *Mayor v. City Bank,* 58 Ga. 584, following, and to the same effect, *Sneed v. Wiggins,* 3 Ga. 94; *Ottawa N. P. R. Co. v. Murray,* 15 Ill. 336; *Ferris v. Ferris,* 28 Barb. 29. See, also, *Lybrand v. Fuller,* 30 Tex. Civ. App. 116, 69 S. W. 1005; *First Nat. Bank v. Peck,* 8 Kan. 660.

But there are adjudications the other way, notably one particularly relied upon by counsel for the plaintiffs. *Chicago R. E. Co. v. Merchants' Bank,* 136 U. S. 268, 284–286, 10 Sup. Ct. 999, affirming 25 Fed. 809. We must hold that, by the express terms of the stipulation and the default in paying the annual interest which became due and payable April 15, 1904, the whole of each note "immediately became due and collectible." It follows from what has been said that the plaintiffs took the notes after they became due and payable and subject to the equities between the original parties.

2. But we are constrained to hold that it was error to direct a verdict in favor of the defendants. We find no defense established by undisputed evidence. The defense of duress seems to be without foundation so far as the record before us is concerned. What constitutes duress has frequently been stated by this court. *City Nat. Bank v. Kusworm,* 91 Wis. 166, 173, 64 N. W. 843; *Wolff v. Bluhm,* 95 Wis. 257, 259, 70 N. W. 73; *Mack v. Prang,* 104 Wis. 1, 6, 79 N. W. 770; *Galusha v. Sherman,* 105 Wis. 263, 280, 281, 81 N. W. 495; *Rochester M. T. Works v. Weiss,* 108 Wis. 545, 84 N. W. 866; *Anderson v. Anderson,* 122 Wis. 480, 485, 486, 100 N. W. 829. All the authorities agree that duress exists where one party, by the unlawful act of another party, has been induced to make a contract or perform some other act under circumstances which deprived him of the exercise of free will. Id. In case of duress the volition of the victim is usually

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overcome by fear of imminent injury to his person or property, and hence it is a gross species of fraud. Id. Whether duress exists in a particular transaction is usually a question of fact for the jury. Id. But in the case at bar the evidence seems to be insufficient to take that question to the jury. While the evidence may be insufficient to establish mental incapacity by reason of intoxication of one of the defendants, yet it may have been admissible as tending to prove the manner in which his signature was procured. We are constrained to hold that the evidence on the questions of false and fraudulent representations was sufficient to take the case to the jury. Those were the important issues in the case. Such issues were broad and included not only representations respecting the horse, but the means resorted to and the manner of obtaining the signatures of the respective defendants. All facts and circumstances bearing upon such issues were admissible in evidence. As there must be a new trial upon such issues, we refrain from further discussion of the evidence. The direction of the verdict in favor of the defendants was error.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

TOMKINS, Respondent, vs. CAMPBELL, Appellant.

May 10—June 21, 1906.

Indians: Sale of timber from allotted lands: Assignment of proceeds.

The patent of lands allotted to an Indian pursuant to the treaty of September 30, 1854, provided that he should not alienate them in any manner without the consent of the President. Rules approved by the President provided that the net proceeds of timber sold from such lands should be deposited in some national bank subject to check of the Indian owner, countersigned by the United States Indian agent. A contract, made under said rules, for the sale of timber from the allotted lands provided for

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payment of the purchase price to the Indian agent in trust for the owner. *Held* that, although the Indian owner had by the act of Congress of February 8, 1887, become a citizen of the United States and emancipated from federal control, his power to dispose of the proceeds of the timber was still subject to the approval of the Indian agent, and hence that an assignment thereof without such approval was invalid.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an appeal from an order overruling a general demurrer to the plaintiff's complaint. The complaint alleges, in substance, that one Antoine Sailor is an Indian of the Bad River reservation, born within the jurisdiction of the United States, and that defendant *Campbell* is the Indian agent of the La Pointe Indian agency; that a treaty was made with the Chippewa Indians of Lake Superior and the Mississippi September 30, 1854, of which the third article is as follows:

"Article Three. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family, or a single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

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The complaint further alleges that, in accordance with the terms of this treaty, the President of the United States, on May 31, 1898, approved the selection by said Sailor of two forty-acre tracts of land on the Bad River reservation, and on August 29th issued and delivered to said Sailor a patent covering said tracts, which contained the proviso that neither said Sailor nor his heirs should sell, lease, or in any manner alienate said tract without the consent of the President of the United States; that on March 31, 1899, said Sailor, with the consent of the President, sold the merchantable timber upon his said allotted lands to one Stearns, under a written contract by the terms of which Stearns agreed to pay certain prices per thousand for said timber "to the United States Indian agent for the La Pointe agency, in trust for the said Sailor;" that Stearns immediately commenced to cut and remove said timber, and that there is now in possession of said Indian agent the sum of $878.83, received by him from said Stearns for such timber, in trust for said Sailor; that on the 30th day of June, 1905, said Sailor, for a valuable consideration, assigned said amount so due him from said agent, by an instrument in writing, to the plaintiff, and directed that the same be paid to the plaintiff, and that plaintiff has demanded payment of said sum to him, but the defendant has refused and still refuses to pay the same, and refuses to deposit the same in bank or countersign Sailor's check therefor, and refuses to pay said sum to Sailor or his assigns, except in monthly payments of $10 each. Certain rules and regulations approved by the President December 6, 1893, under which the timber contract with Stearns was made, are attached to the complaint, among which is the following rule:

"After deducting one half of the cost of the scaling and other necessary expenses chargeable against the same, the proceeds of timber sold from the unallotted portion of the reservation shall be paid to the Indian agent, to be expended for the relief and benefit of the Indians of the reservation under the direction of the commissioner of Indian affairs; and the

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proceeds of timber taken from the allotted lands of the reservation shall, after the deductions above stated, be deposited in some national bank subject to check of the Indian owner of the allotment, countersigned by the Indian agent of the La Pointe agency, unless otherwise stipulated in contracts with particular Indians."

For the appellant there was a brief by *William G. Wheeler* and *Henry H. Morgan,* and oral argument by *Mr. Wheeler.*

For the respondent there were briefs by *Tomkins, Tomkins & Garvin,* and oral argument by *W. M. Tomkins.*

WINSLOW, J. The simple question presented is whether Sailor has absolute control and power of disposition over the money received by the Indian agent in payment for the timber cut from Sailor's allotment of land, or whether his power of disposition is limited and subject to the approval of the Indian agent. The plaintiff's claim is that, because by the terms of the so-called Dawes act of Congress of February 8, 1887 (24 U. S. Stats. at Large, 388, ch. 119), Sailor had become a citizen of the United States and was emancipated from federal control (*In re Heff,* 197 U. S. 488, 25 Sup. Ct. 506), he is necessarily entitled to the full management and control of the proceeds of the timber cut from his lands. Being so emancipated, the argument is that the provision of the rules which requires that the proceeds of the timber be deposited in a bank subject to his check countersigned by the Indian agent means that he has absolute control of the deposit; that the signature of the Indian agent is only required as a means of identification and must be appended by the agent whenever a proper check is presented. While it must be admitted that the Indian allottee under the circumstances stated has become a citizen, it does not follow therefrom that the government has thereby thrown aside all the barriers and restrictions which it had so carefully erected to protect him from his natural improvidence. Notwithstanding he was a citizen, the government in dealing with him and granting him

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rights of property could, if it chose, surround those rights with safeguards or limitations intended for his own welfare and to prevent his squandering his property. The treaty of 1854 clearly contemplates that his ownership of land shall be subject to substantial restrictions upon the right of alienation, and these restrictions were carried into the patent issued long after the passage of the Dawes act, by provisions which deprived him of the power of alienation in any manner without the consent of the President. These restrictions upon alienation of the land, so industriously inserted in the patent, must be borne in mind when considering the intent of the government in its regulations as to the sale of the timber and the disposition of the proceeds. So, also, the pre-existing relations of guardianship which the government has always maintained toward the Indian must be kept in view.

In view of these considerations, what is the natural meaning of the provisions of the contract, that the money for the timber is to be paid to the Indian agent in trust for the Indian, and that it is to be deposited in bank by him subject to the check of the Indian countersigned by the agent? To our minds these provisions cannot be construed as meaning that the government intended to abolish the safeguards which it erected to guard against the Indian's improvidence, but rather that it intended to place the proceeds of the land practically in the same position as the land itself, namely, subject to disposition only by the Indian when such disposition is approved by the government acting through its Indian agent, instead of through the President. There is clearly no reason why the Indian should be prevented from selling or alienating his land, and should be given free disposal of the moneys arising from the sale of the timber thereon, which doubtless constituted the principal part of its value. On the contrary, there is every reason why there should be substantially the same restrictions upon the disposal of his money as upon the disposal of his land. In view of these considerations we find

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no difficulty in construing the provisions of the contract and rules above referred to as meaning that the Indian's power of disposition of the money received from the sale of his timber is subject to the approval of the agent, and hence that the plaintiff cannot recover. The question seems to be a new one, and one not yet presented to the United States courts. So far as the subject has been approached, the decisions favor the construction we have adopted. *Hitchcock v. U. S.* 22 App. D. C. 275; *U. S. v. Thurston Co.* 143 Fed. 287.

By the Court.—Order reversed, and action remanded with directions to sustain the demurrer to the complaint.

HOWARD, Respondent, vs. BELDENVILLE LUMBER COMPANY, Appellant.

May 10—June 21, 1906.

(1) *Jurors: Examination: Interest in casualty insurance company.* (2) *Evidence: Rebuttal: Discretion.* (3) *Instructions: Failure to define "burden of proof."* (4–7, 9) *Special verdict: When taken: Form of questions: Negligence: Proximate cause.* (11) *General instructions.* (8–10, 13) *Master and servant: Personal injuries: Dangerous place: Negligence of co-employee: Court and jury.* (12, 14) *Damages. Future suffering: Permanent injury.*

1. In an action for personal injuries plaintiff's attorney may examine jurors as to their interest in any casualty insurance company as a basis for challenges; but this should be done only in the ordinary way, by proper questions to the jurors, and not as if anything of a peculiar nature were involved therein. No foundation need be laid for such examination, and it is not necessary or proper to require defendant's attorney or his nonprofessional assistant to submit to a private examination as to whether he represents any such insurance company concerned in the action.
2. The trial court has a wide discretion as to whether, after both parties have rested their cases in chief, further evidence shall be confined to such as is strictly rebuttal.

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3. Failure to instruct the jury as to the meaning of the term "burden of proof" is not error where there was no request for such instruction.
4. Under sec. 2858, Stats. 1898, the court may submit the case for special verdict without request of counsel.
5. A special verdict should be composed only of a sufficient number of questions to cover singly the material issues controverted on the evidence, and should be so worded that each question, so far as practicable, shall be susceptible of affirmative or negative answer.
6. The submission in this case of the general question "Was the defendant guilty of negligence which caused plaintiff's injury?" is criticised as involving several questions, which should have been separately submitted, as to the existence of the alleged defect and as to whether defendant had known or been chargeable with knowledge thereof for such a length of time that failure to repair it before the accident was negligence.
7. The submission of four questions as to proximate cause is also criticised on the ground that one, properly worded, would have sufficed, and also because said questions included immaterial matters and matters not in issue and were so framed as to cross-question the jury.
8. In an action for injuries to an employee in a sawmill, alleged to have been caused by a piece of wood falling upon him through a hole which the employer had negligently permitted to remain in the floor above, the fact that negligence of a co-employee combined with that of the employer to cause the injury is not a defense.
9. A general question in the special verdict as to whether plaintiff was guilty of contributory negligence is *held* sufficiently to have covered the question of his assumption of the risk, in the absence of any request for a specific submission of that matter.
10. A reasonably safe working place being furnished to a servant when he is put to work, the master's absolute duty in that regard is satisfied. If thereafter the place becomes unsafe and the servant is injured by reason thereof before the master has knowledge, or reasonable opportunity to obtain knowledge, of the danger and reasonable opportunity to remove it, the master is not liable.
11. Where a case is submitted for a special verdict it is error to give general instructions.
12. In the assessment of damages for future suffering, mental and physical, the jury should be limited by the instructions to such loss in that regard as the evidence satisfies them will be reasonably certain to result from the injury.

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13. **The question whether plaintiff, an employee in a sawmill, was injured in the manner alleged, by his hand being caught between the belt and rim of a pulley, is *held* upon the evidence to have been one for the jury. MARSHALL, J., dissents.**
14. **For injuries to a man thirty-one years old, capable of earning $2.50 to $3 per day, resulting in permanent partial paralysis of his right shoulder and that part of the arm near it and total paralysis of the rest of the arm, an award of $8,000 is *held* not fatally excessive.**

APPEAL from a judgment of the circuit court for Rusk county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Action for personal injuries.

The claim in the complaint was this: September 2, 1904, plaintiff was an employee of defendant in the latter's sawmill at Bruce, Wisconsin. The machinery on the main floor of such mill consisted in part of a slab saw which was attended by one person when the mill was operating. Beneath such saw and extending down to within about two feet of the ground floor there was a box construction for directing the sawdust from such saw to a conveyor running horizontally, nearly, with such floor and about a foot above the same. Passing through the box several feet above such floor there was a shaft, equipped with a pulley, the upper part of which was some feet from the main floor and the lower part some four feet from the ground floor. This pulley was the driver for the slab saw, power being transmitted thereto by a belt. To examine the pulley and belt, as was necessary from time to time, one was required to remove a piece of the box which was fitted for that purpose. In the main floor over where one would necessarily stand in removing the door, so called, of the box so as to expose to view the pulley and belt there was a hole of sufficient size to permit of pieces of wood dropping through and striking whoever might be in their course. The hole was caused by wear. The work on such floor and the location of the person having charge of the slab saw were such that pieces of wood were quite likely to be pushed over the

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brink of the hole. This condition of things was well known to the defendant prior to the occurrence hereafter mentioned. The plaintiff had no knowledge thereof before such occurrence. On said 2d day of September, 1904, at about 4 o'clock in the morning while plaintiff, with due care, was performing his duty to examine the pulley and belt, the door of the box having been removed for that purpose, and he was standing with his right hand resting against the box, with his body somewhat bent over to the left, in the act of looking up into the box, he was struck on the right arm by a piece of wood which came through the hole aforesaid, loosening his hand from the box and causing him to fall forward and to make an involuntary movement of such hand to catch himself, whereby such hand or the arm was caught between the belt and pulley and carried down and around the latter, breaking his shoulder and arm, causing him much pain, and permanently disabling him. He was thirty-one years of age when the injury was occasioned. He was in good health and capable of earning $2.50 a day. He has been damaged as a result of his injuries in the sum of $25,000, besides necessary expenses for surgical and medical attendance of $100.

All allegations as to negligence on the part of the defendant were put in issue by the answer. Also all allegations as to the manner in which plaintiff received his injury and as to the amount of his damages.

During the impaneling of the jury plaintiff's attorney claimed the right to interrogate each juror as to whether he was connected in any way with any accident or casualty company, saying that he understood defendant's attorney represented such a company in the action. Exception to such remark was taken by defendant's attorney, he at the same time asserting that he knew of no accident or casualty company being interested in the case and that he represented the defendant only. Plaintiff's attorney persisted and requested to have defendant's attorney sworn and examined on the subject.

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The request was refused, but the court interrogated each juror at length as to whether he was connected with any such insurance company either as a stockholder or policy-holder or as an insurer of his employees or in any other manner. Defendant objected to the examination and duly saved exceptions in respect thereto. After the close of the evidence the court, counsel on both sides, and a Mr. Prince, who was present, apparently associated with the attorney for defendant in some capacity other than that of an attorney, withdrew from the presence of the jury, and the judge then, against the protest of defendant's counsel, required said Prince to submit to an examination under oath as to whether he represented any accident or casualty company interested in the cause. He testified that he was the adjuster for the Ocean Accident & Guaranty Corporation, and that he supposed the defendant company was paying the expenses of the litigation, but that he had no personal knowledge of the matter or as to whether the insurance company had a policy covering the accident in question; that his company sometimes attended to litigation of that sort where it was not directly interested because of having a policy covering the case.

The proof offered to support the plaintiff's claim was in substance this: There was a slab saw on the main mill floor, the sawdust from which was disposed of by passing down through a box underneath the saw to a conveyor near the ground floor. Through this box there was a shaft on which there was a pulley connected with the slab saw as alleged in the complaint. The business of plaintiff was to look after the machinery on the ground floor during the night shift. That required him, from time to time, to examine the condition of such pulley and belt. In doing so he was required to approach the box, step up on an eight-inch timber lying horizontally on the floor between two bridge-tree timbers standing upright thereon some two or three feet apart and remove the door of the sawdust box, which door was about three feet

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long. That being done, and the operative standing upright between the bridge trees and the mill being in operation, the situation was like this: The pulley was twenty-four inches in diameter. Its motion was outward from the upper side. The speed was about 600 revolutions per minute. The belt was about eight inches wide. The top of the operative's head was about one foot above the top of the pulley. The outer rim of the pulley reached to within about fifteen inches of his body and to within about five inches of the outside of the box, and it filled the box from right to left except about three inches on each side. Some two weeks before the accident a new belt was put on because the old one did not run true. The new one was accustomed to run from side to side, somewhat, and to keep it in place a piece of wood was nailed in the box about seven feet from the bottom thereof on the right-hand side. A few moments before the accident plaintiff finished repairing a belt by which power was transmitted to some machinery on the main floor. Having done so and cleaned up the dirt occasioned thereby he proceeded to look after the belt in the box. He stepped upon the eight-inch timber aforesaid and removed the outside of the box, setting it aside. He then placed his hand on the box at the top of the opening, somewhat to the right, and leaned to the left, turning his head upward sufficiently to enable him to look up into the box where the guide aforesaid was located. While he was in the act of so looking, a piece of wood about eight inches long and two inches square came from above, striking his arm and glancing off to and striking his face. Instantly thereupon his hand was released from the box and he fell forward, the motion of his arm being such that it or the hand was caught between the pulley and the belt and whirled around the former till it was released. As his hand and arm were so carried partly around the pulley his body with great force was jerked forward against the outside of the box, his face striking the left-hand edge thereof, and his arm was twisted and broken and so strained as to per-

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manently destroy its usefulness. On occasions prior to the injury when he had opened the box and examined the belt and pulley he had not observed any hole in the floor above. There was such a hole, the same being where the person who tended the slab saw was required to stand. It was about ten inches square. When the stick of wood fell to the floor he looked at it and so was able to tell about its size. He also looked up to see where it came from and observed the hole. He could not say just how his hand or arm was caught or released, but thought the hand came down on top of the pulley and went around to the place where it was released by the belt leaving the pulley. The hand was injured somewhat. It went in and out very quickly. He said:

"I should judge that it [the hand] passed down and away from me up to where the belt left the pulley on the farther side. I don't know for certain whether my hand went clear around or not, or whether it slipped out before it got clear around. I know there was a mark on the back of my hand where it was skinned."

As corroboration the person who operated the slab saw testified to there being a hole in the floor through which a piece of wood might have fallen and struck the plaintiff. He said the hole was caused by a wearing out of the floor; that it had been there some time; that he had to exercise care to avoid stepping into it; that several times he had called attention thereto in order to have it fixed, and that he was accustomed to cover it with loose lumber or slabs. Plaintiff testified that he walked around some, outside of the mill, after he was injured; that after a while he met one of the employees, who took him into the engine room, where he soon became unconscious, and in that condition was taken home. He did not say to any one before being taken from the mill or thereafter, except as hereafter indicated, that he was injured while examining the belt in the box, until he made such claim in the action. He testified that he never told any person connected with de-

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fendant how he was injured. He admitted having said to one of defendant's officers that there was a belt off; that it took him quite a while to put it on because he had to lace it; that after he did that he walked into the engine room and then out and around and just then got hurt.

On behalf of defendant there was evidence to the effect that about three months after the accident plaintiff and his wife signed a written statement that the injury was caused while he was attempting to put on a belt; that his arm was caught thereby, throwing him to the floor, and that he could not tell just how it was done. They testified that a man visited them and discussed the question of their expenses and appeared to write down what they said in that regard; that they read the paper; that the man then laid it with others on the table and asked them to sign, which they did, supposing they were signing the paper they had read; that they made no such statement to the man as the one contained in the paper in fact signed and produced upon the trial. There was testimony by the secretary and treasurer of the defendant that some two weeks after the accident plaintiff visited defendant's office and there said he did not know how the accident occurred; that he did not blame any one; that he fixed a belt, then went over by the box and was injured there. Mr. Stewart, the foreman of the mill, testified that before the plaintiff was taken from the mill he said he did not know how he was injured, and later at his home, when he was apparently in good condition to relate the facts, that he said he could not tell the first thing about the matter. The witness further testified that it was the spring after the injury before he knew of any claim that the injury occurred at the box under the slab saw; that he went into the basement of the mill after the accident and found no indication of there having been any disturbance there except that the belt was off of the big conveyor some thirty feet from the slab-saw box. The defendant's bookkeeper, who was present when the

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plaintiff made the statement to the president in the office, corroborated it. The person who had the same work to do as plaintiff on the day shift testified that when he came on, after the accident, he found everything in order on the ground floor; that about a month after the accident plaintiff told him he did not know how he got hurt; that the witness often took off the door of the box under the slab saw and examined the operation of the belt, looking up as plaintiff testified he did, but never observed any hole in the floor above.

Plaintiff on rebuttal denied in detail the testimony of each of the witnesses as regards his having said he did not know how his injury occurred.

At the close of the evidence the defendant moved the court for a verdict which was denied. The court then sent the case to the jury for a special verdict on its own motion. There were exceptions to instructions given and refused, which will be referred to, as far as may be necessary, in the opinion. The jurors found as facts, in substance:

1. Plaintiff was injured while on duty in defendant's mill by contact with the machinery therein.

2. Plaintiff was injured by negligence which was the proximate cause of such injury.

3. Such injury was not produced by negligence of a co-employee.

4. Defendant's alleged negligence was the proximate cause of the injury.

5. The injury was not caused by concurrent negligence of defendant and the fellow-servant of the plaintiff.

6. Plaintiff was not guilty of any contributory negligence.

7. Eight thousand dollars will be required to compensate plaintiff for his injury.

Such motions were made and exceptions saved to rulings thereon as were necessary to preserve for consideration questions discussed in the opinion. Judgment was rendered in plaintiff's favor on the verdict, and defendant appealed.

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For the appellant there was a brief by *Morton Barrows* and *L. E. McGill,* and oral argument by *Mr. Barrows* and *Mr. S. L. Perrin.*

For the respondent there was a brief by *Samuel A. Anderson* and *W. H. Stafford,* and oral argument by *Mr. Anderson.*

MARSHALL, J. The proceedings which occurred during the impaneling of the jury and at the close of the evidence, in regard to whether any casualty insurance company was interested in the litigation, merit criticism. Whether, under the circumstances, they should be regarded, of themselves, as prejudicially erroneous, is questionable and need not be decided. It may be otherwise, though, if so, they come very dangerously near that line.

Very much of the criticism, indulged in as to a tendency of jurors in cases of this sort of deciding issues from biased views, suggests rather faulty administration than inherent weakness in the jury system. It is firmly believed that by careful attention, from the beginning to the end of a jury trial, to protect the jury from all ulterior influences and to carefully avoid useless colloquies between court and counsel having a suggestive tendency as to the nonprofessional hearers, regarding the mental leanings of the court either as regards the particular case or similar controversies, and such attention by manner and speech, so far as practicable, to persuade the jury up to the ideal plane of absolute impartiality necessary to a decision of the controversy in hand, entirely uninfluenced by anything except the evidence produced before them and the law as given by the court, the results will continue in the future, as in the past, to vindicate the truth of the saying that the safest tribunal that has been or probably can be created to decide mere issues of fact, is a carefully impaneled jury of twelve men. From our own experience as trial judges, we are utterly unable to appreciate

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the frequent suggestions made that a defendant in a case of this sort, or one where an insurance company defends, cannot, by reason of inherent weakness in the system, obtain justice at the hands of a jury.

The difficulty with the criticised proceedings is attributable to the attitude of all concerned in examining the jury on the *voir dire*. Counsel for plaintiff said:

"I don't know if this is the proper time and place to mention anything with reference to the fact of a casualty insurance company being interested in this case."

That was the initial mistake. There was no necessity for mentioning any such thing to the court or in the presence of the court other than by proper questions propounded to jurors. That first mistake was followed by a long colloquy between court and counsel, on both sides, as to the propriety of examining the jury respecting whether they were interested in any casualty company concerned in the litigation and as to whether the attorney who appeared for the defendant represented such a company, during which plaintiff's attorney was accused by defendant's attorney of endeavoring to prejudice the jury, and the latter, protesting innocence in that regard, asked leave to examine under oath defendant's attorney as well as a Mr. Prince, who appeared to be the latter's nonprofessional assistant, on the subject of discussion, ending with a suggestion by the judge that he would inquire into that later, and then himself taking up the matter of examining the jurors on such subject, which he did fully. Such proceedings, manifestly, are not well calculated to promote the attainment of justice. Just as clearly they have a tendency to create impressions in the minds of jurors prejudicial to the proper consideration of the case in hand.

If counsel for plaintiff had proceeded, without any announcement to the court, to ask the jurors as to whether they were directly or indirectly concerned in any casualty insurance company, as a basis, if one existed, for challenges to the

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favor or peremptory challenges, he would have been strictly within his right. There was no more necessity for the supposed preliminaries than there would be for a foundation for interrogating a juror as to whether he is a relative of any party to the litigation, or to either of the attorneys engaged therein, or interested directly or indirectly with any such party or attorney in business, or with reference to any other of numerous matters that might be suggested. It was the announcement by counsel, as if something of a peculiar nature was involved in the examination he proposed entering upon, the attitude of the court with reference thereto and the whole proceedings, suggestive of such matter being specially out of the ordinary, and of the existence of a secret interest behind the litigation, putting the defendant in the position of falsely and secretly pretending to be the real party in interest—which was liable to work mischief. Quite similar proceedings took place in *Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833. There counsel for defendant was required by the court to disclose under oath whether he represented an insurance company concerned in the litigation. That was condemned, it being said:

"The mere fact that an insurance company was concerned in the litigation was wholly immaterial. The attitude of the court as to compelling appellant's counsel to bear evidence in respect thereto, notwithstanding the assurance of respondent's counsel that the information sought for was wanted only as a basis for interrogating the jury, clearly gave undue importance to the insurance company's connection with the case, since no such basis was necessary. It was a matter quite likely to prejudice the jury and should not have been adverted to at all except by questions to the particular juror under examination and 'strictly within the right' to discover whether any bias or basis therefor on his part existed."

The procedure in this case did not go quite so far, in the presence of the jury, as in the one quoted from, so we feel

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justified, here, in stopping short of condemning the same as sufficiently prejudicial, by itself, to work a reversal. Why the proceedings were taken, which occurred after the close of the evidence, of counsel and the court retiring from the presence of the jury and requiring the nonprofessional assistant of appellant's counsel to be sworn and examined as to whether he represented any casualty insurance company concerned in the litigation, we are wholly unable to understand. Certainly, if they had to occur, the trial court is to be commended for having retired for the time being from the presence of the jury. It seems that the mainspring of the several steps, including the last, was the notion that some basis for the examination of the jurors on the particular subject was necessary to be affirmatively laid, including some showing of good faith on the part of counsel for the plaintiff. That was all wrong. No such basis was required, as before indicated, any more for the purpose of inquiring into such particular matter than for inquiring into any other, necessary, in the judgment of counsel, acting reasonably, to enable him to perform his professional duty in selecting a jury. He should have simply asked fair questions in regard to the subject, and in case of an objection being made it should have been promptly overruled. . This subject has been sufficiently treated here in *Faber v. C. Reiss C. Co.* 124 Wis. 554, 102 N. W. 1049, and *Chybowski v. Bucyrus Co.* 127 Wis. 332, to warrant omitting to pursue it further. We have discussed the same at considerable length because it seems, from this and the two other instances where we have recently been called upon to deal with the subject, that some pretty definite statement as to the proper conduct of judicial administration in respect to the matter is required.

Complaint is made that evidence was permitted on rebuttal which was really cumulative. Courts have a pretty wide discretion as to whether after a party has rested in chief and the opposite party shall have made his case the former shall

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be restricted, as to further evidence, to such as is strictly rebuttal. The better practice is to direct the trial along the lines of regular order unless there is a fairly good reason for departing therefrom. We are unable to say that there was any inexcusable departure from such order in this case.

Further complaint is made because the court failed to instruct the jury as to the meaning of the term *burden of proof*. There does not seem to have been any request for instructions on that line, therefore harmful error cannot be predicated on failure to do so. *Seyring v. Eschweiler,* 85 Wis. 117, 55 N. W. 164; *Lueck v. Heisler,* 87 Wis. 644, 58 N. W. 1101; *Koch v. Ashland,* 88 Wis. 603, 60 N. W. 990; *Odette v. State,* 90 Wis. 258, 62 N. W. 1054. No error was committed by submitting the case to the jury for a special verdict without request by counsel. The statute expressly authorizes such submissions. Sec. 2858, Stats. 1898.

Several assignments of error are presented for consideration as to questions contained in special verdict. It does not seem advisable to consider them in detail, though we will do so in a general way. The verdict as framed by the learned court cannot well be considered a safe model to be followed. However, generally speaking, it covered the case, confused though it was with some unnecessary questions, and faulty in not containing questions covering clearly the precise matters of fact in controversy on the evidence. This court has said so many times that a special verdict should be composed only of a sufficient number of questions to cover singly the issues raised by the pleadings, material to the case and controverted on the evidence, so worded that each question, so far as practicable, shall be susceptible of affirmative or negative answer, that nothing can be gained, it seems, by a repetition in that regard. Strict attention to this matter is a judicial duty.

Here, there was no dispute but what the respondent was injured at the time alleged in the complaint. No question

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on that point, therefore, was needed. The only negligence pleaded was failure on the part of defendant to seasonably repair a wornout condition of the main mill floor. That, at the most, required these questions: (a) Was there a hole in the mill floor as alleged? (b) If there was such a hole, did the defendant know thereof a sufficient length of time before the accident, by the exercise of ordinary care, to repair the same before such time? (c) If there was such a hole, had it existed for such length of time before the accident that defendant, in the exercise of ordinary care, should have discovered and repaired the same before such time? An affirmative answer to the first and to either of the others would have established the negligence complained of as a matter of law.

It will readily be observed that the matters covered by the suggested questions were distinctly pleaded as the ground of negligence relied on and were distinctly put in issue by the answer and were clearly controverted on the evidence. The trial court's question: "Was the defendant guilty of negligence which caused plaintiff's said injury?" was in legal effect the three suggested questions combined. That is not the manner the special-verdict statute contemplates that such matters shall be submitted to a jury, though under proper instructions such method has not been condemned as fatally erroneous. However, we may well say in passing, trial courts should not feel at liberty to commit all errors which have been or may be held not fatal to the result which may finally be reached.

The next issue of fact in order was whether the existence of the hole in the floor, if one did exist as alleged, was the proximate cause of the plaintiff's injury. On that a question should have been submitted about like this: If you answer the first question and either the second or third in the affirmative, were such facts the proximate cause of plaintiff's injury? That would have sufficed for these four questions

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which the learned court submitted: (a) "Was the defendant guilty of negligence which caused plaintiff's said injury?" (b) "Was plaintiff's said injury produced by reason of negligence of his co-employee, Hanson?" (c) "Was defendant's alleged negligence the proximate cause of plaintiff's said injury?" (d) "Was plaintiff's said injury caused by the combined negligence of defendant and that of the plaintiff's co-employee, Hanson?" There was no issue on the pleadings or the evidence warranting the questions designated as (b) and (d). Moreover, whether the injury was caused by the combined negligence of the defendant and his co-employee, Hanson, if there had been such an issue in the case, which there was not, was entirely immaterial since such mere contributory negligence of a co-employee is not a defense in a case of this sort. *Jones v. Florence M. Co.* 66 Wis. 268, 284, 28 N. W. 207; *Paulmier v. Erie R. Co.* 34 N. J. Law, 151; *Franklin v. W. & St. P. R. Co.* 37 Minn. 409, 34 N. W. 898; *Hunn v. Mich. Cent. R. Co.* 78 Mich. 513, 44 N. W. 502; Beach, Contrib. Neg. § 305. So by submitting the four questions instead of the one, the rule was violated that immaterial matters should not be included in a special verdict; also the rule was violated that questions should not be so framed as to cross-question the jury, and the further rule was violated that no question should be included in a special verdict not covering a distinct issuable controverted fact.

Complaint is made because of failure to submit a question covering the subject of assumption of risk. There are two answers to that: (1) There was no such issue in the case either by the pleadings or on the evidence. (2) The general question on the subject of contributory negligence sufficiently covered the form of such negligence called assumption of the risk in the absence of any request for a particular submission of such matter. *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 74 N. W. 554.

The court said to the jury: "You are instructed that it

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was the duty of the defendant to provide a place that was reasonably safe for the plaintiff to do his work in while in the exercise of ordinary care," and gave further instructions in connection therewith, well calculated to impress upon the minds of the jurors the idea that such rule applies, not only to the time the working place is originally furnished to the servant, but to every instant of time thereafter during the period of his employment. That was very misleading.

True, it is the duty of the master to furnish the servant with a reasonably safe place in which to work. True, that duty is absolute. It cannot be delegated by the master. It cannot be performed by him by merely exercising ordinary care to furnish such place. It is satisfied only by the actual furnishing thereof. But that refers to the time when the servant is put to work, not to every time when, thereafter, in the course of continuous employment, at the customary intervals, he re-occupies his place, nor to every instant of time during the period of his employment. A reasonably safe working place having been furnished the servant, the absolute duty in that regard is satisfied. Then becomes active the secondary duty to exercise ordinary care to preserve for the servant the reasonably safe condition of his working place. In case of its becoming unsafe during the course of his employment, and the servant receiving an injury thereby before the master has knowledge of the existence of the danger or has reasonable opportunity to obtain such knowledge, and reasonable opportunity to remedy the danger, he is not liable. *Hulehan v. G. B., W. & St. P. R. Co.* 68 Wis. 520, 32 N. W. 529; *Paine v. Eastern R. Co.* 91 Wis. 340, 346, 64 N. W. 1005; *Quincy C. Co. v. Hood,* 77 Ill. 68; *Baldwin v. St. L., K. & N. R. Co.* 68 Iowa, 37, 25 N. W. 918; *Stapf v. V. Loewer's G. B. Co.* 1 App. Div. 405, 37 N. Y. Supp. 256; *Artis v. Buffalo, R. & P. R. Co.* 3 App. Div. 1, 37 N. Y. Supp. 977, 38 N. Y. Supp. 42; *Park Hotel Co. v. Lockhart,* 59 Ark. 465, 28 S. W. 23; *Wabash, St. L. & P. R.*

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Co. v. Locke, 112 Ind. 404, 14 N. E. 391; *St. Louis, Ft. S. & W. R. Co. v. Irwin,* 37 Kan. 701, 16 Pac. 146; *Mickee v. Walter A. Wood M. & R. M. Co.* 77 Hun, 559, 28 N. Y. Supp. 918; *Haskins v. N. Y. Cent. & H. R. R. Co.* 79 Hun, 159, 29 N. Y. Supp. 274; *Binns v. R. & D. R. Co.* 88 Va. 891, 14 S. E. 701; 20 Am. & Eng. Ency. of Law (2d ed.) 92, 93, and cases cited in the note.

The courts have spoken thus decisively on the subject last discussed:

"It was incumbent on the plaintiff to show affirmatively that at the time the accident happened" the condition of the track "was either known to the company or had existed for such length of time before the accident as to constitute notice to the company that the track was in an unsafe condition at that place." This court speaking by TAYLOR, J., in *Hulehan v. G. B., W. & St. P. R. Co.* 68 Wis. 520, 525.

"The duty to provide a reasonably safe place for the employee to perform his service in rests upon the master, and that duty is one that cannot be shifted or evaded by any attempt to delegate it." "This duty is also a continuing one to the extent that the master must provide reasonably for the inspection and if need be for the repair of premises and appliances." MONTGOMERY, J., in *Anderson v. Mich. Cent. R. Co.* 107 Mich. 591, 65 N. W. 585.

"The doctrine that the master must provide a safe place has no application to the case where the place becomes unsafe during the progress of the work." MCCLAIN, J., in *Oleson v. Maple Grove C. & M. Co.* 115 Iowa, 74, 87 N. W. 736.

The language of this court by Mr. Justice WINSLOW in *Paine v. Eastern R. Co.* 91 Wis. 340, is quite as decisive.

In submitting the subject of proximate cause to the jury the learned court used the term "approximate," both in the questions for the special verdict and the instructions. In this case probably the misuse of terms was not harmful since the court gave as an explanation of what was called "approximate cause" a fairly accurate definition of *proximate* cause.

Quite inexcusable error was committed, we feel called

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upon to say, in view of the many recent decisions of this court on the subject, in that the court while submitting the case to the jury for a special verdict gave at considerable length general instructions. Such instructions, as has often been said, are wholly unsuitable in case of a special verdict. It may be that it was supposed by the learned court that since the verdict was required upon the court's own motion, instead of in response to the demand of counsel, a different rule would apply than the one so many times emphatically proclaimed by this court. If so, the supposition was baseless. There is no reason for the instructions to be specifically directed to the special questions in case of a special verdict, when required by counsel, that does not apply, just as strongly, when it is otherwise required. This court has held upon due consideration of the matter that in case of such a verdict the parties to the litigation are entitled, as a matter of statutory right, to have the jury instructed as to the particular questions submitted, and not generally at all. *Lyon v. Grand Rapids,* 121 Wis. 609, 99 N. W. 311; *Van de Bogart v. M. & M. P. Co.* 127 Wis. 104, 106 N. W. 805; *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378, 388, 75 N. W. 169; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 219, 78 N. W. 442; *New Home S. M. Co. v. Simon,* 104 Wis. 120, 80 N. W. 71; *Brunette v. Gagen,* 106 Wis. 618, 82 N. W. 564; *Rhyner v. Menasha,* 107 Wis. 201, 206, 83 N. W. 303; *Sladky v. Marinette L. Co.* 107 Wis. 250, 259, 83 N. W. 514; *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36; *Bartlett v. Collins,* 109 Wis. 477, 85 N. W. 703; *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816; *Byington v. Merrill,* 112 Wis. 211, 88 N. W. 26; *Cullen v. Hanisch,* 114 Wis. 24, 37, 89 N. W. 900; *Okonski v. Pa. & O. F. Co.* 114 Wis. 448, 457, 90 N. W. 429; *Gutzman v. Clancy,* 114 Wis. 589, 90 N. W. 1081.

This instruction was given to the jury on the subject of damages: "You will also assess all such sums as you are

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satisfied from evidence will recompense him for all future suffering, both mental and physical." That was prejudicially erroneous. The jury should have been limited in assessing damages for future suffering, mental and physical, to such loss, in that regard, as the evidence satisfied them would be reasonably certain to result from the injury. *White v. Milwaukee C. R. Co.* 61 Wis. 536, 21 N. W. 524; *Hardy v. Milwaukee St. R. Co.* 89 Wis. 183, 187, 61 N. W. 771; *Block v. Milwaukee St. R. Co.* 89 Wis. 371, 380, 61 N. W. 1101; *Raymond v. Keseberg,* 91 Wis. 191, 64 N. W. 861; *Groundwater v. Washington,* 92 Wis. 56, 61, 65 N. W. 871; *Kliegel v. Aitken,* 94 Wis. 432, 438, 69 N. W. 67; *Collins v. Janesville,* 99 Wis. 464, 465, 75 N. W. 88; *Boelter v. Ross L. Co.* 103 Wis. 324, 330, 79 N. W. 243.

Error is assigned, raising the question as to whether the evidence presented a fair jury question regarding whether respondent received his injury in the manner he claimed he did. A careful study of the record has resulted in some hesitation in reaching a satisfactory conclusion in respect thereto. It certainly seems quite improbable that one could have his hand caught between the belt and rim of a heavy iron pulley, twenty-four inches in diameter and eight inches on the face, revolving at the rate of 600 revolutions per minute or sixty feet per second, the sides of the pulley being within three inches of the sides of a box inclosing it, and that the arm could be carried down and around the pulley to a point of release, dragging it necessarily in between the sides of the pulley and the sides of the box, and forcibly jerking the body forward, without much more disastrous consequences than occurred in this case. To the majority, but not all, of the members of the court the respondent's story does not seem wholly improbable. Again, the almost overwhelming evidence that the respondent stated, on numerous occasions after he was injured, that he did not know how the injury occurred; that the story told upon the trial

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was not known to any one, so far as appears, till the action was commenced, and two apparently credible witnesses examined the condition of things at and in the vicinity of the alleged scene of injury shortly after the accident and found all in order, while, if respondent's testimony be true, the door of the sawdust box must have been left down from the time of the accident till some one other than himself replaced it, and still other circumstances that might be referred to, involving the matter in doubt, lead to the conclusion, on the part, at least, of the writer, that the evidence, as a whole, did not remove the question of how the accident occurred from the realms of mere conjecture and so did not present a fair jury question under the rule laid down in *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729. However, by far the prevailing opinion is that the respondent's positive story of how his injury was received was not so incredible but what it was permissible for the jury to believe it and to base a verdict thereon. That rules the case on that subject in his favor, so the decision must be and is that the question in relation thereto was properly submitted to the jury.

Further complaint is made that the damages assessed are grossly excessive. The man was thirty-one years of age when he was injured. He was capable of earning $2.50 to $3 per day. He was not a common laborer, but an engineer. The evidence was to the effect that his arm near the shoulder and the shoulder were partially paralyzed and that the balance of the arm was totally so; that the motor and sensor nerves were destroyed beyond any reasonable expectation of restoration, leaving his arm practically a dead body: an incumbrance. The evidence tended to if it did not conclusively show that such condition would not materially change for the better. Manifestly from such evidence the respondent's injury was a very serious one. It was much more so than the mere loss of an arm would be. The circumstance also is quite material that the injured mem-

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ber was the right arm. A careful examination of the precedents satisfies us that we would not be justified in condemning the verdict as fatally excessive, though doubtless it approached dangerously near the border line thereof, notwithstanding, as indicated, the injury was a very severe one.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

OMA, Appellant, vs. WILKINSON, imp., Respondent.

May 10—June 21, 1906.

Appeal: No appearance for respondent: Reversal on the merits.

Where the plaintiff is appellant and files a brief, if there is no appearance by the respondent this court, on appellant's motion, will reverse the judgment or order appealed from with the same effect as if the appeal had been heard and all questions raised by the appellant decided in his favor on the merits.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Appeal by plaintiff from an order sustaining general demurrer of defendant *Emma E. Wilkinson* to each of the six separate causes of action in complaint. The first alleges *Emma E.* and George D. Wilkinson to be husband and wife, the latter being the owner and occupying as a homestead, with his wife, certain described lots in Ashland, situated in a thickly inhabited part; that *Emma* negligently and wrongfully caused to be stored in the barn located on the said homestead premises a quantity of dynamite, her separate property, with the knowledge and consent of her husband, George D. Wilkinson; that such storing on said premises was a nuisance and a menace to the property of all parties living

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in the vicinity; that January 8, 1905, the barn took fire and such dynamite exploded, by reason whereof plaintiff's dwelling house was severely injured to an amount specified. Each of the other causes of action is identical with the first, except that they allege injury to the buildings of other neighbors and assignments by the respective owners of the same to the plaintiff. No appearance being made for the respondent in this court, appellant, having filed a brief, requested a reversal on the merits in accordance with the rule announced in *Hughes v. Libby,* 42 Wis. 639.

For the appellant the cause was submitted on the brief of *G. N. Risjord.*

[No appearance for respondent.]

By the Court.—After full reconsideration of the reasons there assigned, we adhere to the rule promulgated in *Hughes v. Libby,* 42 Wis. 639, and therefore reverse the order appealed from with the same effect as if we had heard the appeal and decided all the questions raised by appellant in his favor upon the merits. The cause is remanded for further proceedings accordingly.

NASH, Appellant, vs. FRIES and others, Respondents.

May 10—June 21, 1906.

Constitutional law: Vesting legislative power in court: Organization of towns: Statute construed: "Discretion."

Ch. 21, Laws of 1905, provides that upon the hearing of a petition for organization of a town the circuit court "shall file findings of fact, . . . and if it shall appear that the facts set forth in the petition are true, and all the requirements of" the law "have been complied with, in its discretion, shall enter an order" creating the territory into a town, etc. *Held,* that the act

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authorizes the court to exercise only the discretion which always rests with the trier of facts, and does not confer upon it any discretion as to the expediency or propriety of making the order when the requisite facts are found. It is therefore not invalid as vesting a legislative function in the court.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Appellant, together with other citizens and freeholders, presented a petition alleging all the facts required by ch. 21, Laws of 1905, for the organization of the town of Shanagolden, in Ashland county, whereupon the court, on motion of attorneys for respondent, dismissed said petition, on the ground that sec. 775*d* (sec. 1, ch. 21, Laws of 1905), under which said petition had been filed, is unconstitutional, from which order *Nash,* one of the petitioners, appeals.

For the appellant there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *A. T. Pray.* As to the meaning of the word "discretion" they cited 11 Cent. L. J. 504, 505; *In re Leonard,* 15 Fed. Cas. 331; *State ex rel. Lamb v. Cunningham,* 83 Wis. 90, 137; *Towle v. State,* 3 Fla. 202, 214; Coke, Litt. 227, b; 14 Cyc. 383; *Rooke's Case,* 5 Coke, 99; *Darling v. Westmoreland,* 52 N. H. 401, 408; *Colburn v. Groton,* 66 N. H. 151, 28 Atl. 95; *Bundy v. Hyde,* 50 N. H. 116, 120; *Rex v. Wilkes,* 4 Burr. 2527, 2539.

For the respondents the cause was submitted on the brief of *Lamoreux & Shea.* They cited Const. art. IV, sec. 1; *In re North Milwaukee,* 93 Wis. 616, 624; *Glaspell v. Jamestown,* 11 N. Dak. 86, 88 N. W. 1023; *Murray v. Buell,* 74 Wis. 14, 18.

DODGE, J. Ch. 21, Laws of 1905, provides that contiguous territory containing at least a government township, being part of any town or towns and having at least fifty resident electors and an assessed valuation of at least $100,000, may be organized into a town upon compliance with the fol-

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lowing three sections. The first of said sections (sec. 775*b*) provides for presentation to the circuit court of a petition by a majority of the resident electors and homesteaders of the proposed territory, correctly describing the same, naming the town or towns of which it is a part, containing the names of the resident electors and assessed valuation of the territory and the proposed name of the new town, and duly verified by at least three signers. The court then fixes a date for hearing and prescribes notice. The next section (sec. 775*c*) authorizes protests, and directs that the hearing of the petition shall be tried as an issue of fact by the court. Then sec. 775*d* provides:

"The court shall file findings of fact at the close of such hearing, and if it shall appear that the facts set forth in the petition are true, and all the requirements of the three preceding sections have been complied with, in its discretion, shall enter an order creating such territory into a town, naming the same," etc.

The question for decision, namely, the constitutionality of this law, depends upon the construction which we must give to the three words, "in its discretion," contained in sec. 775*d*. If they are intended to vest in the court authority to pass upon the wisdom and policy of the creation of a new town after all of the facts specified in the statute have been found to exist, then the legislation clearly falls within the criticism made in *In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033, upon the statute there considered. It would then be obvious that the legislature had attempted to delegate to the court the function of deciding a question of legislative policy, and not merely the ascertainment of the existence of certain facts and conditions upon which the legislature had decided and declared the purpose and policy that a new town should be created. If, on the other hand, this phrase may be considered as referring back to the requirement for filing findings of fact and ascertainment as to whether the facts set forth in the petition are true and all

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the requirements of the three preceding sections have been complied with, and to call upon the court merely to exercise that judicial function of judgment and discrimination in weighing evidence and making up its conclusion which is also often referred to as discretion, it would not be obnoxious to the case above cited. It would then merely refer to the court the ascertainment and decision as to the existence of certain necessary preliminary facts, and, when those facts are found to exist, would impose upon it the absolute duty of making an order which, by behest of the legislature itself, would bring into existence the new town. Thus the law itself would pass upon all questions of policy and expediency, which are legislative, and would refer to the court nothing but the judicial function of trying and determining the facts upon which the law is to become effective. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 65 N. W. 738.

The phraseology of the section is unfortunate if the latter be the legislative meaning. It must be admitted that the three words under consideration practically add nothing to the functions which would be imposed on the court by the statute if they were eliminated, for no court can properly and judicially try an issue of fact without the exercise of that wisdom and judgment which in that case would be designated as discretion. Nevertheless, by many authorities, the word "discretion" is properly enough used to express that judicial judgment in discriminating as to weight and cogency between different witnesses and between conflicting evidentiary documents and circumstances which must be exercised in reaching any conclusion of fact from evidence. Said this court, per ORTON, J., in *Murray v. Buell,* 74 Wis. 14, 18, 41 N. W. 1010, 1011:

"There are different kinds of discretion that may be exercised by the trial court. . . . In all cases courts must exercise a discretion in the sense of being discreet, circumspect, prudent, and exercising cautious judgment."

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Again, by PINNEY, J., in *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 68, 65 N. W. 739, by way of quotation, "half the statutes on our books are in the alternative, depending upon the discretion of some person or persons, to whom is confided the duty of determining whether the occasion exists for executing them." See, also, *State ex rel. Lamb v. Cunningham,* 83 Wis. 90, 137, 53 N. W. 35; *Darling v. Westmoreland,* 52 N. H. 401, 408; *Osborn v. Bank of U. S.* 9 Wheat. 738, 866.

It is, of course, the duty of courts to presume an intention on the part of the legislature to act constitutionally, and, as between two constructions of a statute, one of which would be within the legislative power and the other forbidden to it, to adopt the former if at all reasonable. It is only when the unconstitutional purpose is clear beyond a reasonable doubt that a court can be justified in declaring void an act of the legislature. *Att'y Gen. v. Eau Claire,* 37 Wis. 400, 438; *Johnson v. Milwaukee,* 88 Wis. 383, 389, 60 N. W. 270; *Verges v. Milwaukee Co.* 116 Wis. 191, 198, 93 N. W. 44. In view of these considerations we deem it permissible, and therefore our duty, to read this law as commanding the court, upon presentation of such petition as is required, to enter the order of incorporation, if, upon trial of the facts, exercising in so doing that discretion which always rests with the trier of facts, it finds the conditions prescribed by the statute to have been duly alleged and to exist, and consequently to hold that it does not confer upon the court any authority to exercise its discretion over the expediency or propriety of making the order when such facts are found. Upon this construction there is nothing of the legislative function attempted to be vested in the court, and therefore the objection made to the law is untenable.

By the Court.—Order appealed from is reversed, and cause remanded for further proceedings according to law.

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HAMMEL, Respondent, vs. CAIRNES and another, Appellants.

May 10—June 21, 1906.

Chattel mortgages: Affidavit required after sale: Statutes: Construction: Forfeiture: Taking "under and by virtue of mortgage."

1. Ch. 122, Laws of 1903 (providing that whenever any property covered by a chattel mortgage shall be taken and sold under and by virtue of such mortgage pursuant to the power of sale contained therein an affidavit stating certain facts shall be filed within ten days after the sale, and that in case of failure to file such affidavit the debt secured by such mortgage shall be deemed fully satisfied and the mortgage canceled), affects not the remedy merely, but the right, and hence does not apply to mortgages antedating its enactment.
2. Such statute, being highly penal, should be strictly construed to avoid a forfeiture.
3. Voluntary surrender of the mortgaged property by the mortgagor to the mortgagee, and sale pursuant thereto, are not such a taking and sale as the statute means, and failure to file the affidavit thereafter does not work a forfeiture. The statute refers to a hostile taking.

APPEAL from a judgment of the circuit court for Oneida county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

This action was brought to foreclose two real-estate mortgages given by defendants to plaintiff, one to secure an indebtedness of $900 according to the terms of four promissory notes specified in the first cause of action, and the other to secure an indebtedness of $276 according to the terms of several promissory notes as specified in the second cause of action. The defendant *James Cairnes* answered admitting the execution of the notes and mortgages referred to, and alleged payment in full, and further answered that the notes and mortgages set forth in the first cause of action were given to secure the purchase price of a stallion purchased by defendant from plaintiff, and that there was given in addition thereto to plaintiff by defendant, as further security, a chattel mortgage on said stallion; that there was also given a chat-

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tel mortgage on one gray horse as additional security for the note specified in the second cause of action; that the plaintiff seized and sold said property covered by said chattel mortgages by virtue thereof, and entirely failed to comply with the provisions of ch. 122, Laws of 1903, and thereby the indebtedness became fully satisfied. Except as admitted, the answer denied generally the allegations of the complaint. The case was tried by the court, and the court found in favor of plaintiff. Judgment was rendered accordingly, from which this appeal is taken.

The cause was submitted for the appellants on the brief of *A. W. Shelton,* and for the respondent on that of *Sam S. Miller.*

KERWIN, J. There is no bill of exceptions; therefore we can only consider whether the pleadings and findings support the judgment. The execution of the notes and mortgages referred to in the complaint is undisputed, and the court found that in the month of May, 1904, after a portion of the indebtedness secured by the mortgages became due, the defendant *James Cairnes* went to the plaintiff's agent and told him that he could not meet the payments, and voluntarily delivered to said agent the property covered by the chattel mortgages; that thereupon the plaintiff, by his agent, gave five days' notice of sale and on May 21, 1904, sold the property at public vendue, and indorsed the amount received therefor, $170, on the notes, which was the only amount ever paid on such indebtedness; that on the 31st day of May, 1904, the agent of plaintiff, who made the sale, executed an affidavit in accordance with ch. 122, Laws of 1903, and immediately delivered the same to a neighbor of the town clerk to be filed in accordance with said chapter. The court found as conclusions of law that there was due upon the notes set up in the complaint the sum of $493.29, besides $30 reasonable solicitor's fees, and that there was to fall due on said notes the sum of $576; that ch. 122, Laws of 1903,

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was not passed and not in force until after the making of the notes and mortgages set forth in the first cause of action, and cannot be considered or applied to affect said notes and mortgage; that the plaintiff attempted in good faith to comply with the provisions of ch. 122 in regard to the sale of the property covered by the chattel mortgages, and that defendants were not damaged or injured in any manner by reason of the affidavit not being filed within the time required by said chapter; that the real-estate security of the plaintiff is in no wise affected by the provisions of ch. 122, Laws of 1903; that the plaintiff is entitled to judgment for the amount due on the notes, and to foreclosure of the real-estate mortgages and sale of the property covered thereby.

The only question involved upon this appeal is whether the failure of the plaintiff to file the affidavit as required by ch. 122, Laws of 1903, forfeited the debt. The $900 note and mortgage were executed before the passage of the law in question, hence are not affected by it. Ch. 122, Laws of 1903, does not affect the remedy merely, but the right; therefore cannot apply to mortgages antedating its enactment. *Eau Claire Nat. Bank v. Macauley,* 101 Wis. 304, 77 N. W. 176; *Peninsular L. & C. Works v. Union O. & P. Co.* 100 Wis. 488, 76 N. W. 359; *Bekkedal v. Johnson,* 127 Wis. 624, 107 N. W. 5. The question, therefore, arises whether the failure to file the affidavit within ten days forfeited the debt evidenced by the note set forth in the second cause of action. The statute under consideration is not only highly penal, but drastic in its character. It provides that whenever any property covered by a chattel mortgage shall be taken and sold under and by virtue of such mortgage, pursuant to the power of sale contained therein, the owner shall, within ten days after the sale, make and file an affidavit as required by such statute; and further provides:

"Any person violating the provisions of this act shall be liable to the person personally liable for the indebtedness, in which case such person shall be entitled to recover in ad-

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dition to his actual damages the sum of twenty-five dollars liquidated damages. In case of the failure of the owner of any such mortgage, or his agent conducting such sale, to comply with the provisions of this act within the time herein limited, the debt secured by such mortgage shall be deemed fully satisfied and the mortgage canceled."

It is well settled that such statutes should receive strict construction in order to avoid forfeiture, if such can be done without doing violence to the language of the statute. *Cohn v. Neeves,* 40 Wis. 393; *Wright v. E. E. Bolles W. W. Co.* 50 Wis. 167, 6 N. W. 508; *Schumacher v. Falter,* 113 Wis. 563, 89 N. W. 485; *Johnson v. Huber,* 117 Wis. 58, 93 N. W. 826. In *Wright v. E. E. Bolles W. W. Co.* 50 Wis. 167, 170, 6 N. W. 510, this court said:

"The statute is in the nature of a penal one. Its application to this case would increase the damages tenfold. It is confined in its operation to a single class of trespassers, and establishes a rule of damages therefor which may, and often does, give the injured party much more than actual compensation for the injury he has suffered, and much more than he could recover for a trespass upon other property, equally injurious to him and committed under the same circumstances. By all sound rules of construction such a statute should be interpreted with reasonable strictness, and its penalties should be inflicted only in cases clearly within it."

Penal statutes have been construed contrary to the letter where the legislative intent is manifestly against the letter, on the ground that general terms in a statute should be so limited in their application as not to lead to injustice or oppression. *U. S. v. Kirby,* 7 Wall. 482. Viewed in the light of the well-established rule to be applied to penal statutes, we are satisfied that the findings in this case do not warrant the conclusion that the respondent's claim against the appellants was forfeited by failure to comply with ch. 122, Laws of 1903. The forfeiture by the terms of the statute is occasioned when the property "shall be taken and sold under and by virtue of such mortgage pursuant to the

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power of sale contained therein." The court below found that the appellants voluntarily delivered to the respondent's agent the property covered by the chattel mortgage.

Under the language of this penal statute we think that the voluntary surrender of the property by the appellants and acceptance by respondent was not a taking within the meaning of the statute. It seems quite clear that the taking contemplated by this statute is a taking *in invitum* under and by virtue of the power to take and reduce to possession as given in the mortgage. The taking and sale under the mortgage within this statute means a hostile taking by virtue of the right to dispossess the mortgagor of his possession and property under the power given in the mortgage. The statute, we think, is capable of this construction without doing violence to its language, and in view of its highly penal character it should receive such construction. We cannot think that the legislature intended so drastic a remedy should be enforced under the circumstances established by the record in this case. The findings of the court below support the conclusion that there was no forfeiture, and therefore the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed.

In re Dancy Drainage District.

May 10—June 21, 1906.

Drainage districts: Refusal to confirm report: Appealable order: Powers of commissioners: Destruction or impairment of navigable waters: Who may object.

1. In proceedings for the organization of a drainage district the court, under sec. 1379—18, Stats. 1898, as amended by ch. 43, Laws of 1901, refused to confirm the report of the commissioners and condemned the drainage system proposed by them on

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the ground that it would impair the navigability of a river and destroy a lake, but refused to dismiss the proceedings, for the reason that it was not shown that there was no other way, not open to such objections, of effecting the drainage in question. *Held*, that the order was "a final order affecting a substantial right," and therefore appealable under subd. 2, sec. 3069, Stats. 1898. DODGE and WINSLOW, JJ., dissent.

2. Secs. 1379—11 to 1379—31, Stats. 1898, relating to the organization and powers of drainage districts, do not authorize the destruction of a navigable lake or the impairment of the navigability of a river.

3. Remonstrants against the work proposed by the commissioners, under said statutes, may make the objection that such work will impair the navigability of a river or destroy a lake.

APPEAL from an order of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

It appears from the record and is undisputed that the adult owners of a large portion of the premises in controversy filed their petition for the organization of the "Dancy Drainage District" upon about 35,000 acres of land in the counties of Wood, Marathon, and Portage, constituting a large marsh through which the Little Eau Pleine river, a navigable stream rising near the boundary line between Clark and Marathon counties, runs in a southeasterly direction, emptying into the Wisconsin river a short distance beyond the territory described. After due service and publication, certain residents appeared to contest the same, and by due proceedings the court found in effect: (1) That the petition has been signed by a majority of the owners of land within said proposed district who are of lawful age and who represent one third in area of the lands proposed to be affected by said work, and also contains the signatures of the owners of more than one half of said lands; (2) that the proposed drain is necessary and will be useful for the drainage of the lands proposed to be drained thereby; (3) that both the public health and the public welfare will be promoted by the construction of said drain. The court thereupon and on February 19, 1904, ap-

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pointed three commissioners, one from each county, each of whom was a landowner in said district. Said commissioners duly qualified, and on July 19, 1904, duly filed their report, finding the probable cost of the work with incidental expenses to be $161,274.91, and the probable cost of keeping the drain in repair two per cent. thereof, and the probable benefits to be derived therefrom $500,508.81, making the cost less than one third of such benefits. The report revises the boundaries according to the information obtained from their survey, and assessed the benefits upon the lands included, and also assessed damages to a sawmill property, whose dam would have to be removed, at $5,000, and assessed benefits to the municipalities to be benefited thereby and also benefits to the railway company, and further reported that no lands outside of the district would be damaged, and none within the district other than those specified.

Upon such report due service was made of a notice of motion returnable August 20, 1904, for the confirmation thereof and organization of the district. At such date certain persons interested filed protests against the organization of the district, assigning as grounds therefor that the petitioners did not constitute the requisite number of owners; that some signatures were obtained by misrepresentation; that the proposed work is not feasible or necessary or useful; and that the public health and welfare will not be promoted thereby. Further, that the Little Eau Pleine river, a navigable stream used to float and drive logs to a sawmill thereon, and a fresh-water lake, known as Rice Lake, within the limits thereof, will be destroyed, whether the outlet chosen should be the one here proposed or any other. Three of the four towns assessed for benefits protested, stating, in addition to the foregoing grounds, the claim that those municipalities would not be benefited. The *Chicago, Milwaukee & St. Paul Railway Company* protested, assigning the additional ground that it owns a right of way across a portion of the lands in the district with

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which a drainage district has no power to interfere, and that the assessment against it was also unauthorized, and asks that the boundary be so modified as not to interfere with its property and an issue be framed as to its damages. The *Grand Rapids Lumber Company* also protested, assigning, in addition to the foregoing grounds, that the commissioners were disqualified for the position because of interest; that the cost of the construction will exceed the benefits; that the method of assessment of the benefits is arbitrary, unjust, and inequitable.

The report of the commissioners and the objections thereto having come on to be heard on the day fixed for that purpose by the court, and the court having fixed a time and place for the hearing and trial of all issues of law and fact thereby raised, and after hearing all the evidence and arguments of counsel, the court found as matters of fact, in effect: (1) That each of the commissioners heretofore appointed was when appointed, and still is, competent within the meaning of the statute and qualified to hold the position of commissioner. (2) That each and all of said commissioners in their acts and conduct in performing the duties of said office have acted fairly, honestly, impartially, and with good judgment and ability, and there is nothing in their conduct or that of any of them for criticism. (3) That those portions of the Little Eau Pleine river included within the boundaries of the proposed drainage district constitute a navigable stream of the state of Wisconsin. (4) That the body of water known and shown on the map annexed to the commissioners' report as Rice Lake is a part of said stream and co-existent with it and is a part of the permanent inland waters of the state. (5) That the drainage district contemplated by the commissioners' report will materially affect and to some extent impair the natural use of the Eau Pleine river for some purposes of navigation, to wit, the holding of logs for manufacturing purposes within its bayous and parts of the stream, the

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same being one of the navigable uses of the stream. While it has not been established that such system will seriously affect the mere driving of logs down the stream, it nevertheless will seriously affect the floatage of logs within its waters and the holding of them for the purposes of manufacture, and will thus directly impair the navigability of the river for some lumbering purposes. (6) The drainage system contemplated by the commissioners' report will destroy and wipe out of existence the body of water shown and designated on the map as Rice Lake, excepting only as the drainage channel through the same may still continue to exist as a part of the Little Eau Pleine river. (7) That because the proposed drainage system will thus impair the navigability of the Little Eau Pleine river and remove the waters from Rice Lake, the power to do which does not exist in the commissioners and is beyond the power of the court to grant to them, therefore such proposed drainage system cannot be made effective so as to accomplish the object sought and cannot be confirmed by the court. (8) That it was not shown with reasonable certainty that there is no other way of effecting this drainage in some manner not interfering with the rights of navigation and commerce on the Eau Pleine river and Rice Lake, and therefore the proceedings should not be dismissed, but the commissioners retained in office for consideration of the question whether the commissioners shall amend or supplement their report by stating whether some other method can be found which will result in effective drainage and not be open to the foregoing objections to this proposed plan.

As conclusions of law the court found, in effect, that the motion of the petitioners to confirm the report of the commissioners must be denied; that the motion of the objectors to dismiss the entire proceedings must be denied; and that the motion of the objectors to dismiss and annul all acts and proceedings including and subsequent to the order appointing the commissioners must be denied. An order was entered ac-

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cordingly. The commissioners and the petitioners appeal from that part of the order which refused to confirm the report of the commissioners.

For the appellants there was a brief by *Goggins & Brazeau* and *Kreutzer, Bird & Rosenberry,* and oral argument by *B. R. Goggins* and *C. B. Bird.* They contended, *inter alia,* that no landowner on the so-called Rice Lake is objecting to the work on the ground that the lake will be destroyed. Instead, such owners are petitioners. No riparian owner of the log-storing bayous of the river is protesting against injury to his property. If he were, his damage could be compensated. The protestants simply assert the general public interest in a navigable stream, but no special injuries to any objector. It has been adjudged in this proceeding that the public welfare will be promoted, not injured, by this drainage. The objectors have no more standing in court to urge this objection than has a citizen with no special damage to claim abatement of a public nuisance. *Clark v. C. & N. W. R. Co.* 70 Wis. 593. They may complain to the public authorities and seek leave to sue in the name of the public to prevent this wiping out of a few bayous in a little stream of log-driving navigability in a community fast graduating from logs to farms. The public officer will then use his discretion, in view of all the public interests involved. Until this question is raised in the name of the general public it is not before the court. Objectors cannot urge it on their own motion. *State ex rel. Att'y Gen. v. Cunningham,* 81 Wis. 440, 487. But, if presented, is this an objection to this drainage? The court will take judicial notice of the general character of this stream, the extent of its navigability, etc. *State v. Carpenter,* 68 Wis. 165, 171; *The Montello,* 11 Wall. 411. The only claim made for it is that limited navigability for log driving. Such streams are in a class by themselves, and, subject to that right of log driving, may be dammed or otherwise improved without legislative authority, as generally navigable waters may not. *Charn-*

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ley v. Shawano W. P. & R. I. Co. 109 Wis. 563, 569; *A. C. Conn Co. v. Little Suamico L. Mfg. Co.* 74 Wis. 652. It is not a navigable stream of the United States. *Morse v. Home Ins. Co.* 30 Wis. 496, 505. But, if it were, the United States having assumed no jurisdiction over it, the control of the state is plenary and it may change or modify at will. *Montgomery v. Portland,* 190 U. S. 89; *Falls Mfg. Co. v. Oconto R. I. Co.* 87 Wis. 134, 151. Our constitutional provision (art. IX, sec. 1), taken from art. IV of the Ordinance of 1787, that "the navigable waters . . . shall be common highways, and forever free," refers only to political regulations and not to physical disturbances. *Falls Mfg. Co. v. Oconto R. I. Co.* 87 Wis. 134, 152; *J. S. Keator L. Co. v. St. Croix B. Co.* 72 Wis. 62; *Willamette I. B. Co. v. Hatch,* 125 U. S. 1. The state may, in aid of navigation, change, deepen, divert, or close up navigable streams without making compensation for property rights damaged thereby. *Falls Mfg. Co. v. Oconto R. I. Co.* 87 Wis. 134, 150, 151, and cases cited; *Green Bay & M. C. Co. v. Kaukauna W. P. Co.* 90 Wis. 370, 400. For a private purpose, it cannot do so even with compensation. Id. 399. But for a public purpose other than navigation it may, upon making compensation. *Donnelly v. Decker,* 58 Wis. 461, 465; *Smith v. Rochester,* 92 N. Y. 463; Gould, Waters, § 248. Since the legislature has the power to so change streams, and has provided in general terms for these drainage projects, which in most cases must change some stream, it would seem a necessary grant of power results, even if there were no express declaration to that effect. Express grants, even of limited power, do not restrict general inherent authority, though not expressly granted. *Farmers' & M. Bank v. D. & M. R. Co.* 17 Wis. 372; *State v. Wettstein,* 64 Wis. 234. The court will look to the whole act and its apparent purpose to determine the extent of the power given. *Wis. Ind. School v. Clark Co.* 103 Wis. 651. The following cases are to the effect that power to drain streams

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or lakes results as an incident of drainage authority: *Sturm v. Kelly,* 120 Mich. 685, 79 N. W. 930; *Hauser v. Burbank,* 117 Mich. 463, 76 N. W. 109; *Strayer v. Taylor,* 163 Ind. 230, 69 N. E. 145; *Dowlan v. Sibley Co.* 36 Minn. 430; *Goodrich v. Stangland,* 155 Ind. 279, 58 N. E. 148; *Lussem v. Sanitary Dist.* 192 Ill. 404, 61 N. E. 548.

For the respondents there was a brief by *Brown, Pradt & Genrich, Park & Carpenter,* and *G. L. Williams,* and oral argument by *L. G. Bohmrich* and *Neal Brown.*

There was a separate brief for the *Chicago, Milwaukee & St. Paul Railway Company* by *Hurley & Jones,* and oral argument by *M. A. Hurley.*

CASSODAY, C. J. 1. The appealability of the portion of the order in question is not challenged nor mentioned in the briefs of counsel. It was suggested on the argument, but counsel for the respondents requested a decision upon the merits. Such suggestion was in consequence of the discussion in another case decided herewith. *In re Horicon Drainage Dist., ante,* p. 42, 108 N. W. 198. That was an appeal from an order appointing commissioners under sec. 1379—13, Stats. 1898, as amended by sec. 1, ch. 43, Laws of 1901, and it was held that the order was not appealable. In writing the opinion of the court in that case, my brother KERWIN has given a synopsis of several sections of the statutes for organizing drainage districts, as amended, and pointed out that the only authority therein given to appeal to this court is found in sec. 1379—18, Stats. 1898, as amended by sec. 2, ch. 43, Laws of 1901. That section relates to the action of the court on the report of the commissioners, and gives the court authority to require a modification of the same and to determine all controversies in the matter, and then, among other things, declares:

"If the finding be against the validity of the proceedings the same shall be dismissed at the cost of the petitioners. If the finding be in favor of the validity of the proceedings, the

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court, after the report shall have been modified to conform to the findings, or if there be no remonstrance, shall confirm the same, and the order of confirmation shall be final and conclusive, the proposed work shall be established and authorized and the proposed assessments approved, subject to the right of appeal to the supreme court."

The court not only refused to confirm the report, but found against the validity of the proceedings, so far as they purported to "destroy and wipe out of existence the body of water shown and designated on the map as Rice Lake," and in so far as the "proposed drainage system" would "impair the navigability of the Little Eau Pleine river." The "drainage system" reported by the commissioners included the destruction of Rice Lake and its navigability, and also the impairment of the navigability of the river running through the same. Such "drainage system" is expressly condemned by the findings of the court, and it is also expressly found that "such proposed drainage system cannot be made effective so as to accomplish the object sought and cannot be confirmed by the court." The statutes seem to contemplate that the findings of the court and the order made thereon shall be final and conclusive, "subject to the right of appeal to" this court. True, the court refused to dismiss the proceedings, on the express ground that "it was not shown with reasonable certainty that there is no other way of effecting this drainage in some manner not interfering with the rights of navigation and commerce on the Eau Pleine, river and Rice Lake." But such "other way" would necessarily be a system of drainage not contemplated in the report of the commissioners. The order of the court is final and conclusive as to the drainage system so reported. It is "a final order affecting a substantial right made in special proceedings." Subd. 2, sec. 3069, Stats. 1898. Such an order, "within the meaning of this statute, is one which determines and disposes finally of the proceeding—one which, so long as it stands, precludes any further steps therein." *Kingston v. Kingston,* 124 Wis. 263, 264, 102

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N. W. 577. See, also, *Bryant v. Robbins,* 70 Wis. 258, 35 N. W. 545; *S. C.* 74 Wis. 608, 43 N. W. 507; *In re Theresa Drainage Dist.* 90 Wis. 301, 63 N. W. 288; *Stone v. Little Yellow Drainage Dist.* 118 Wis. 388, 95 N. W. 405. We must hold that the order is appealable.

2. The important question presented is whether the trial court was justified in holding that the commissioners, by the "drainage system" so reported, had no power to "destroy and wipe out of existence the body of water shown and designated on the map as Rice Lake," nor to "impair the navigability of the Little Eau Pleine river," and that it was "beyond the power of the court to grant to" such commissioners any such power. Certainly, the statutes providing for the "organization and powers of drainage districts" do not in terms give any such power. Secs. 1379—11 to 1379—31, Stats. 1898, as amended. The broadest power given to the commissioners by these sections is to "do any and all necessary acts in and about the surveying, laying out, constructing, repairing, altering, enlarging, cleaning, protecting and maintaining any drain, ditch, levee or other work for which they shall have been appointed, including all necessary bridges, crossings, embankments, protections, dams and lateral drains, clearing out and removing obstructions from natural or artificial channels or streams within or beyond the limits of the drainage district, procuring, purchasing or condemning, under proceedings similar to the proceedings had on the award of damages hereunder, riparian rights, rights of flowage and water powers, and may use any moneys in their hands arising from assessments for that purpose." Sec. 1379—22, Stats. 1898. One of these sections declares that the provisions of the preceding "sections shall be liberally construed to promote the public health or welfare by reclaiming wet and overflowed lands, building embankments or levees and the preservation of any system of drainage . . . constructed according to law." Sec. 1379—31, Stats. 1898. But there is no mention nor refer-

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ence in any of those sections to the destruction of any lake or river, nor to the impairment of the navigation of any lake or river—much less a meandered lake or river. As indicated in numerous adjudications of this court, some of which are cited by counsel for the petitioners, the legislature, in aid of navigation, has power to authorize the deepening and widening of channels, the building of flooding dams, and other structures. *Falls Mfg. Co. v. Oconto River Imp. Co.* 87 Wis. 134, 150, 151, 58 N. W. 257, and cases there cited. To authorize structures in aid of navigation is a very different thing than to authorize the destruction of a navigable lake or to impair the navigability of a river. As indicated, the sections of the statutes cited do not in terms authorize such destruction or impairment. On the contrary, another section of the statutes expressly declares:

"All lakes wholly or partly within this state which have been meandered and returned as navigable by the surveyors employed by the government of the United States or which have been so meandered and are navigable in fact are hereby declared to be navigable and public waters, and all persons shall have the right to pass to and fro, be and remain thereon and have and enjoy all other rights and privileges thereon and thereto to the same extent and with the like effect as in, to, over and upon any other navigable or public waters." Sec. 1607*a*, Stats. 1898.

It is undisputed that Rice Lake is a meandered body of water and navigable in fact, and it is also undisputed that the Little Eau Pleine river is a navigable stream, which has been used for driving and rafting logs for many years, and that the lake is an enlargement of the river, and that in and upon both the river and the lake fish and game abound. This court has repeatedly held that the title to the bed of a meandered lake navigable in fact "is in the state in trust for legitimate public uses, such as fishing, navigation, and the like;" and that "the state cannot convey it away for private uses, nor can it abdicate the trust." *Att'y Gen. ex rel. Askew v. Smith,* 109 Wis.

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532, 539, 85 N. W. 512, and cases there cited. In one of the cases cited it was held, on the last appeal to this court:

"It is the duty of the legislature to preserve for the benefit of all the people of the state, forever, the enjoyment of the navigable waters within its boundaries. The navigable waters of the state belong to the state, and the lands under them, in all situations, so far as it is necessary to preserve inviolate the common right to enjoy those incidents which are not the subject of private ownership in navigable waters at common law." *Priewe v. Wis. State L. & I. Co.* 93 Wis. 534, 67 N. W. 918; *S. C.* 103 Wis. 537, 549, 550, 79 N. W. 780. See, also, *Rossmiller v. State,* 114 Wis. 169, 186, 187, 89 N. W. 839.

The statutes and adjudications cited certainly justified the trial court in refusing to confirm the report of the commissioners. Counsel claim that the respondents have no such special interest in the lake or river as to authorize them to make the objection. They are certainly parties, and necessary parties, to the proceedings. The petitioners and commissioners have the affirmative and are seeking to invade the rights intrusted to the state. The respondents have as much right to object as they have to proceed. This court has held:

"An attempt by any person or corporation to violate public rights in the navigable waters of the state, to the special injury of a particular person, may be restrained by a private action." *Priewe v. Wis. State L. & I. Co.* 103 Wis. 537, 79 N. W. 780.

So it has held:

"A wrongful invasion of the right to use land for fishing and hunting is actionable, regardless of the amount of the damages caused by such invasion. Every wrongful intrusion by one person upon the legal rights of another is both an injury and a damage and is a proper subject for legal redress." *Diana S. Club v. Lamoreux,* 114 Wis. 44, 45, 89 N. W. 880.

We find no error in the record of which the appellants can rightfully complain.

By the Court.—The portion of the order of the circuit court appealed from is affirmed.

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DODGE, J. (*dissenting*). I am constrained to dissent from the judgment of affirmance in this proceeding, because it is obvious that this court has no jurisdiction by appeal to review the order entered in the court below. The right of appeal essential to give us jurisdiction in such matters is purely statutory. *Maxon v. Gates,* 118 Wis. 238, 95 N. W. 92. The only appeal authorized is, generally, in special proceedings, by subd. 2, sec. 3069, Stats. 1898, from "a final order affecting a substantial right made in special proceedings." I have no doubt whatever that upon the coming in of the commissioners' report in a drainage proceeding, under sec. 1379—11 to sec. 1379—18, Stats. 1898, if an order is made either confirming the report and establishing the drainage district or dismissing the proceeding, such order is final and affects a substantial right. In the language of *Kingston v. Kingston,* 124 Wis. 263, 102 N. W. 577, it "determines and disposes finally of the proceeding—one which, so long as it stands, precludes any further steps therein." This I understand to be in accord with the view taken in *In re Horicon Drainage Dist., ante,* p. 42, 108 N. W. 198. The difficulty is, however, that the present order does neither. It refuses to confirm the report, and therefore the drainage district is not yet established; but it also refuses to dismiss the proceedings, upon the ground, as stated by the court, that he is not convinced that some modification of the plan reported by the commissioners is not possible so as to obviate the objections he now finds to the establishment of a drainage district in general pursuance of the policy of the petition filed. The statute (sec. 1379—18) seems to contemplate that such a situation may arise, and then expressly authorizes the court to again refer the matter to the commissioners, who may modify their report in any respect. This situation seems to me identical with one where, before proceeding to judgment, the court has declared that either the pleadings or the evidence will not support a judgment in accordance with the complaint, but that, before enter-

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ing judgment, the parties may have opportunity to amend the pleadings or add to the evidence. In such case, obviously, the time of final adjudication would not have arrived. The consideration that the reasons advanced by the court, when and if carried into final order, would be conclusive against the petitioners, has no bearing upon the right of appeal, which is given not from the decision, but from the final order. *Nevil v. Clifford,* 51 Wis. 483, 8 N. W. 296; *Maynard v. Greenfield,* 103 Wis. 670, 79 N. W. 407; *Sutton v. C., St. P., M. & O. R. Co.* 114 Wis. 647, 91 N. W. 121; *Land & S. Co. v. South Milwaukee,* 127 Wis. 284, 106 N. W. 850. Other cases which seem to me to refute the appealability of this order are: *In re Schumaker,* 90 Wis. 488, 63 N. W. 1050; *Cook v. McComb,* 91 Wis. 445, 65 N. W. 181; *Johns v. N. W. Mut. R. Asso.* 94 Wis. 431, 69 N. W. 160. When our mandate of affirmance shall have gone down to the trial court, there will, to my mind, still exist there a proceeding which may go on for years and finally terminate in an order either establishing a drainage district in pursuance of the present petition or dismissing the proceedings, and from which either party in interest will then have a right to appeal.

A suggestion was made at bar that, since an order dismissing the proceeding would be appealable, an order refusing to dismiss, being the converse ruling of the court upon the same motion, ought to be. This reasoning has been repudiated in many analogous cases. The order of dismissal terminates the proceeding and is final; the order refusing to dismiss perpetuates it, and is not final. *Moyer v. Koontz,* 103 Wis. 22, 79 N. W. 50; *Welsher v. Libby,* 106 Wis. 291, 82 N. W. 143; *Benolkin v. Guthrie,* 111 Wis. 554, 87 N. W. 466. Perusal of the opinion fails to make entirely clear to my mind whether the decision is based upon want of power in the legislature to destroy a navigable body of water when public health or welfare demands, or merely upon absence of clear and unambiguous delegation of such power to drainage districts. I pre-

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sume the latter ground only is intended to be declared, since I did not understand that a majority, if any, of the members of the court expressed opinions in favor of the former. I am not prepared to hold that the legislature has not power to abate a public nuisance, a menace to public health, merely because navigable or fishable. Doubtless the purpose to delegate so high a power to any inferior tribunal is to be inferred only from the most unambiguous expression. *Winchell v. Waukesha,* 110 Wis. 101, 108, 85 N. W. 668. I agree fully that the statute under consideration contains none such.

WINSLOW, J. I concur in the views expressed by Mr. Justice DODGE.

AUER, Appellant, vs. MATHEWS, Respondent.

May 11—June 21, 1906.

Contracts: Reformation: Specific performance: Vendor and purchaser of land.

1. A contract will not be reformed on the ground of mistake unless there was some definite agreement which by mutual mistake was omitted from or wrongfully stated in the written contract.
2. To be specifically enforced, a contract must be definite and certain in its terms, or capable of being made definite by the aid of legal presumptions or by evidence of contemporaneous facts and circumstances which is properly admissible.
3. A contract to convey "forty-seven descriptions located in" certain sections in two certain towns, "and containing not less than 1,700 and no more than 2,000 acres,"—there being no agreement as to what particular tracts, out of fifty-seven descriptions considered by the parties, should be conveyed,—is too indefinite to be specifically enforced.

APPEAL from a judgment of the circuit court for Oneida county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

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For the appellant there were briefs by *S. S. Miller,* attorney, and *Hoyt, Doe, Umbreit & Olwell,* of counsel, and oral argument by *L. A. Olwell.*

For the respondent the cause was submitted on the brief of *E. D. Minahan.*

WINSLOW, J. This is an action in equity to reform and specifically enforce a written contract for the conveyance of lands. There is very little dispute as to the facts. Plaintiff owned a house and lot in Milwaukee, and defendant owned a quantity of cut-over timber lands in town 39 north of range 8 east, and town 39 north of range 9 east, in Oneida county. October 30, 1902, they entered into a written agreement by which plaintiff agreed to convey to defendant the house and lot and defendant agreed to convey to plaintiff "forty-seven descriptions located in sections 1, 5 [etc., enumerating a large number of sections], in town 39 north, range 8 east, and in section 5, town 39 north, range 9 east, in Oneida county, Wisconsin, and containing not less than 1,700 acres and no more than 2,000 acres." The contract contained other provisions as to the valuation of the properties and the terms of payment of the difference in value, not material to the questions presented here. It appears that at the time the contract was made the defendant had furnished to the plaintiff a plat of township 39, range 8, upon which fifty-four forty-acre tracts or descriptions were marked with a cross, and upon which three descriptions in township 39, range 9, were noted in writing, and that *Mr. Mathews* did not know how many of these fifty-seven descriptions he could furnish good title to, but thought he could furnish good title to 1,700 acres at least, and at the outside 2,000 acres.

On account of this uncertainty as to the descriptions to which the defendant could furnish title, the contract was drawn in the indefinite terms stated. There was no mistake or error in drawing the contract. It represented just what

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the parties orally agreed, namely, that the defendant was to convey forty-seven descriptions in two certain towns. The parties never agreed as to which of the fifty-seven descriptions marked on the plat were to be conveyed to make up the forty-seven referred to in the contract. From this simple statement of admitted facts it is plain there can be neither reformation nor specific enforcement of the contract. In order to reform a contract there must be proof that there was some definite agreement which by mutual mistake was omitted from or wrongly stated in the written contract. There was no such omission or erroneous statement here. The contract expresses just what the parties agreed upon. It was indefinite because the agreement of the parties was indefinite. In order to specifically enforce an instrument it must be definite and certain in its terms, or capable of being made definite by the aid of legal presumptions or by evidence of contemporaneous facts and circumstances which is properly admissible. *Schmeling v. Kriesel,* 45 Wis. 325; *Singleton v. Hill,* 91 Wis. 51, 64 N. W. 588; *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532; *Park v. M., St. P. & S. S. M. R. Co.* 114 Wis. 347, 89 N. W. 532; *Buck v. Pond,* 126 Wis. 382, 105 N. W. 909. Here there was no agreement ever made as to what particular lands were to be conveyed. No specific tract can be identified as one of the forty-seven tracts referred to in the agreement, because no specific tracts were ever in fact agreed upon.

These were the conclusions reached by the trial court, and the complaint was properly dismissed.

By the Court.—Judgment affirmed.

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JOHNSON, Plaintiff in error, vs. THE STATE, Defendant in error.

May 11—June 21, 1906.

Criminal law: Homicide: Murder in second degree: Evidence: Res gestæ: *Statements of defendant: Reputation for truth and veracity: Manslaughter: "Involuntary killing:" "Heat of passion:" Instructions to jury.*

1. Evidence tending to show, among other things, that after an altercation with the deceased in a saloon, during which the lie was passed, defendant left the room in anger and quickly returned with a revolver, with which during a struggle with the deceased, who was trying to prevent him from using it, he shot the deceased three times, is *held* sufficient to sustain a conviction of murder in the second degree under sec. 4339, Stats. 1898, involving a finding that the act was one "evincing a depraved mind, regardless of human life."
2. The decision of the trial court as to whether matter is admissible in evidence as a part of the *res gestæ* is to be treated as correct unless manifestly wrong.
3. To be admissible as part of the *res gestæ*, a statement of the accused must have been an undesigned incident of the act in question, so near to and so connected with that act as to indicate its character.
4. After shooting a man during a struggle in a saloon, defendant telephoned for a doctor and thereafter remained for a time in the saloon. He then went to his room in the same building, and in a few moments left the building to go to the police station to give himself up. After walking about a third of a mile he boarded a street car, told where he wished to go, and made statements to the motorman as to what had occurred. *Held*, that the trial court properly excluded such statements as not being part of the *res gestæ*.
5. Evidence that defendant in a criminal case was reputed to be a man of truth and veracity was properly excluded, where no attack had been made upon his reputation in that regard.
6. The wilful shooting of a person with fatal effect, though done in the heat of passion and without design to effect death, cannot be deemed an "involuntary killing" within the meaning of sec. 4362, Stats. 1898, defining manslaughter in the fourth degree. The term *involuntary* signifies inadvertence. *Schlect v. State*, 75 Wis. 486, criticised.

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7. The term "heat of passion," as used in the statutes relating to criminal homicide, means such mental disturbance, caused by reasonable, adequate provocation, as would ordinarily so overcome and dominate, or suspend the exercise of, the judgment of an ordinary man as to render his mind for the time being deaf to the voice of reason, make him incapable of forming and executing that distinct intent to kill which is essential to murder in the first degree, and cause him, uncontrollably, to act from the impelling force of the disturbing cause, rather than from any real wickedness of heart or cruelty or recklessness of disposition. It is not inconsistent with intelligent action, with consciousness of what one is doing and of the responsibilities therefor. An instruction that heat of passion means "such passion as amounts to a temporary dethronement of the reason and rendering the slayer incapable of forming a deliberate, premeditated design to kill," etc., was therefore erroneous. *Hempton v. State*, 111 Wis. 127, explained.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Reversed.*

The accused, *John S. Johnson,* was charged with the highest degree of criminal homicide. He was in due form found guilty by the jury of the crime of murder in the second degree, and was thereupon sentenced to be punished by confinement at hard labor in the state prison at Waupun, Wisconsin, for the period of fourteen years, suitable provision according to law being made for solitary confinement. He was committed accordingly and was at the time of suing out the writ, and still is, serving his time. The facts of the case and the points suggested for consideration upon the review will be reserved for the opinion.

For the plaintiff in error there was a brief by *W. E. & F. P. Burke* and *John M. Clarke,* and oral argument by *W. E. Burke.*

For the defendant in error there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and oral argument by *Mr. Titus.*

MARSHALL, J. On the 10th day of August, 1904, the accused resided at a boarding house in the city of Milwaukee

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in which there was a saloon. He owned a revolver to the knowledge of the keeper of the house. He procured it some time prior to his residence in Milwaukee and while he was temporarily staying in Chicago, and carried the same in the latter place by permission of the police because, as he claimed, he had been threatened with and feared personal violence by members of a labor organization who conceived his business methods to be antagonistic to their interests. His residence in Milwaukee was of a temporary character and for the purpose of introducing there a patented device of which he was the inventor. He had been there about one month when the event causing his conviction occurred. About 10 o'clock on the evening of August 10th aforesaid he and others were in the saloon part of the boarding house engaged in the pastime of drinking, deciding in advance by shaking dice who should pay the bills. He was substantially a stranger to his associates. He claimed later that he supposed they were members of the class by whom he had been threatened in Chicago. After several rounds of shaking dice and drinking, Patrick Doyle and the accused being contestants on several of the occasions, they shook again and got into an altercation as to the result, ending with passing the lie between them and the accused leaving the room hurriedly and in anger. There was evidence tending to prove this. When the accused so left the room he used expressions indicating a purpose to return better prepared for attack or defense and to vindicate his position by force. He was heard to go rapidly through the dining room, into the hall leading to the stairs, along such hall to and up the stairs, then down the upper hall to his room, and to immediately retrace his steps to the saloon. During the short time of his absence one of the saloon attendants who knew of his having the revolver requested Doyle to leave the place so as to avoid the threatened trouble, which he declined to do. As the accused re-entered the saloon room Doyle started towards him with his left hand raised in an attitude and man-

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ner suggesting intention to explain. *Johnson* immediately reached for his revolver, which was in his pocket. Seeing the movement and the weapon drawn and raised Doyle moved quickly forward toward *Johnson,* endeavoring to lay hold of him so as to prevent his using the weapon. Shooting immediately commenced. Several shots were fired within a short interval of time during which, except possibly at the instant of the first shot, the parties had hold of each other and were down or partially down on the floor. At last two shots were fired in rapid succession, when Doyle made some expression indicating a wish to cease the struggle, when the two separated. In a few moments Doyle was dead. As soon as the separation occurred a call for a doctor for the wounded man was suggested, and thereupon the accused volunteered to do that, which he did, being under such excitement that it was with some difficulty he made himself understood by the one called. Shortly after such calling, the accused went to his room. A few moments thereafter he left the place by the side door, for the purpose of going to the police station and giving himself up. He walked the distance of some five blocks and then boarded a street car. Soon thereafter he made statements to the motorman as to what had occurred and the circumstances thereof and said that he wanted to ride to the police station. He claimed on the trial that he procured his revolver merely to protect himself from supposed impending danger; that his purpose in returning to the saloon room was to treat the crowd and settle the existing difficulty that way; that before there was opportunity for him to carry out such purpose he was attacked by Doyle; that he fired the first shot through the window, being careful to see that no one was in the path of the bullet, and for the purpose of scaring Doyle; that the latter as he rushed toward the accused attempted to strike him with a beer bottle; that the deceased choked the accused, grasping him from behind, at the same time endeavoring to get hold of the revolver and turn it against the body of

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the accused and discharge it; that the latter succeeded in working the weapon up over his shoulder and toward Doyle and then fired; that Doyle continued to choke the accused so he could not speak, in the meantime getting upon his shoulders, the accused being upon his knees, when he fired two shots backward; that Doyle then signified enough and the separation occurred; that the reason the accused armed himself and used his weapon was that he believed his life was in danger. There was evidence tending, strongly, to indicate that he had no reasonable ground to fear Doyle; that he was the real aggressor; that Doyle was wholly unarmed; that he did not strike the accused with a beer bottle or attempt to do so or to strike him in any other manner; that all he did was to make unsuccessful efforts to prevent the accused from successfully using the weapon.

The foregoing sufficiently indicates the circumstances of this case as the jury had the right to view them. We have not attempted to give the evidence in any considerable detail. It will suffice for the proper consideration of the questions presented to show, as we have, what the evidence tended to prove and that such tendency, notwithstanding evidence to the contrary, was sufficiently probative to justify the jury, reasonably, in believing beyond a reasonable doubt that such tendency pointed to the truth.

The first point made on behalf of plaintiff in error is that there was no evidence warranting a conviction of the accused of murder in the second degree. The idea advanced is that though the homicide was accomplished by an act imminently dangerous to others, it was not one evincing a depraved mind regardless of human life, and so did not satisfy all elements suggested by the language:

"Such killing, when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person killed or of any human being, shall be murder in the second degree." Sec. 4339, Stats. 1898.

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There does not appear to be any merit in that contention. The mere passing of the lie under the circumstances of the case might well have been considered by the jury an inadequate provocation for such passion as to satisfy any of the degrees of manslaughter required to be characterized by heat of passion. They may well have considered that for a person to angrily dispute over such a trifling matter as who should pay a paltry sum for the drinks, his adversary apparently not being much, if any, his superior in strength and ability to defend himself by ordinary means, and upon being called a liar to rush off to his room, return armed with a revolver, bent on using it to secure an apology or revenge, to draw it, and, while his adversary was merely trying to prevent it from being successfully used, to discharge it four times, sending three bullets into the body of his victim with fatal effect, very clearly evinced a depraved mind, regardless of human life. The jury, having found the accused guilty of an offense higher than manslaughter, must have viewed the evidence quite charitably in finding a verdict of murder in the second degree instead of murder in the first degree. They were, it seems, well warranted in believing that the shots that took effect were fired during the struggle when the two men were down, or substantially so, on the floor; that though the weapon was, when discharged, pointed at a vital part of Doyle's body, the position of the accused was such that he may not have been conscious of that precise fact and may have fired thinking thereby more of disabling Doyle, yet regardless of consequences, than of taking human life. In other words, that he had no specifically formed design to take such life, but worked the weapon as he did moved by a depraved mind, regardless of human life, within the meaning of the statute. The case seems to present more clearly the essentials of murder in the second degree than did *Odette v. State,* 90 Wis. 258, 62 N. W. 1054, or *Flynn v. State,* 97 Wis. 44, 72 N. W. 373. As said in effect in the latter case, the evidence was open, reasonably,

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to the view that the act of the accused was that of an angry man, without adequate provocation to suggest, reasonably, manslaughter in the third degree, evincing a depraved mind, regardless of human life, without the formed design to take human life essential to murder in the first degree.

Error is assigned because testimony was rejected as regards what the accused said about the circumstances of the homicide, when he was on the street car, journeying to the police station to surrender himself into the custody of the law. If the story told to the motorman was so near to and connected with the transaction to which it referred as to really characterize it, then it was within the field of *res gestæ,* and the evidence in relation thereto should have been admitted. What does and what does not form part of the *res gestæ,* as regards any particular occurrence, is often not clearly ascertainable. The principle governing the matter has definite boundaries, but whether any particular circumstance falls within such boundaries, upon the matter in regard thereto being presented to a trial court, is a question of competency, the decision of which is to be treated on appeal as a verity unless manifestly wrong. *Emery v. State,* 101 Wis. 627, 648, 78 N. W. 145; *Hupfer v. Nat. Dist. Co.* 119 Wis. 417, 96 N. W. 809; *Kavanaugh v. Wausau,* 120 Wis. 611, 98 N. W. 550.

Since a minor circumstance cannot be properly said to be a part of the *res gestæ* as to the major matter, unless it is so connected with the latter as to speak for itself, as it is said, indicating the character of the main fact, such minor circumstance, in order to fall within the field of *res gestæ,* must necessarily be undesigned, and so must have an unbroken causal relation to the main subject of inquiry. At the point where that causal relation is so interrupted by time or other circumstances that what lies further on no longer appreciably illustrates the character of the main fact, is the boundary line between what is and what is not *res gestæ.* There is no controlling rule as to the length of time between the happening of the

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main fact and that of the minor incident claimed to characterize the former, by means of which the validity of the claim in that regard can even be established *prima facie.* The time which is sufficient to break the chain under some circumstances would not be under others. Under some the time might be very brief and under others it might be considerable. When the claimed evidentiary circumstance is so far disassociated with the main fact as not to be appreciably considered an incident of it, it is mere hearsay, not *res gestæ.*

In this case the accused did not leave the scene of the homicide until some time after it occurred. He took time to summon the doctor. While so doing he was admonished into some fair degree of coolness and quietude by the doctor, who was unable, at first, by reason of the excited state the accused was in, to understand what was wanted. Thereafter the accused remained in the saloon room for a time considering whether to, as he said, wait until the deceased's pockets were examined. Then he went to his room sufficiently composed to form, which he did, a deliberate purpose to forestall being arrested on a warrant, by going to the police station and surrendering himself to the authorities. He then put on his hat, passed down the hallway to and down the stairs, and out the side door of the building into the street. He then walked down the street somewhere about one third of a mile toward his destination, when an opportunity presented itself for him to continue his journey on a car. He concluded to improve it. After boarding the car he told the motorman where he wanted to go and related that which it was sought to prove as *res gestæ.*

This relation of the matter shows, it seems, without further comment, that the occurrence on the car was too remote from the homicide to be so clearly an incident of it as to preclude the trial court from holding that it was outside the boundaries of *res gestæ.* There had been too much time for reflection, too much time to calculate upon the consequences, and too much opportunity and motive for making up a story with ref-

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erence to the future, to warrant holding that the statement on the car was an undesigned incident of the main fact, the homicide.

Evidence was offered to prove that the accused was reputed, in his home country, to be a man of truth and veracity, and the evidence was rejected. While the ruling on that matter is presented for review, counsel for the accused was too candid with the court to press it with any considerable degree of confidence. It was conceded, as of course the fact is, that it is quite elementary that a witness is not to be supported by proof of his having a good reputation for truth and veracity, till his reputation in that regard shall have been directly attacked. 2 Wigmore, Evidence, § 1104; 1 Jones, Evidence, § 156. That rule is the logical result of the other one that the law presumes every person to be reputed truthful till evidence shall have been produced to the contrary, and therefore, for one to take the initiative in establishing that which so needs no support, other than the legal presumption, is useless.

The court refused a request to submit to the jury the question of whether, on the evidence, the accused was guilty of manslaughter in the fourth degree. That is defined by sec. 4362, Stats. 1898, thus:

"The involuntary killing of another by any weapon or by any means, neither cruel nor unusual, in the heat of passion, in any cases other than such as are herein declared to be justifiable or excusable homicides, shall be deemed manslaughter in the fourth degree."

The idea suggested by counsel is that if there was no design to effect the death of Doyle and there was evidence of heat of passion, as the trial court held there was by instructing the jury on the subject of murder in the third degree, and the homicide was caused by a weapon of some sort, though without the use of any cruel or unusual means, the offense is within such statutory definition. That proceeds upon the theory that an involuntary killing is synonymous with killing with-

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out design to effect death as that term is used in the statutory definition of several statutory homicidal offenses. Probably counsel was justified in that view by what was said in *Schlect v. State,* 75 Wis. 486, 44 N. W. 509.

The circumstances in the case referred to were that when the accused and the deceased were clinched and in an angry struggle, the former drew a revolver and, holding it close to the body of the latter and pointing it at a vital part thereof, but without opportunity for deliberation, discharged it with fatal effect. A conviction of manslaughter in the fourth degree was sustained, grounded, without good warrant, it seems, on *People v. Crowe,* 2 Edm. Sel. Cas. 152, and *Keenan v. State,* 8 Wis. 132. In *People v. Crowe, supra,* there is a report of a case tried in the city court of New York presided over by EDMONDS, J., who reported the case, with two aldermen. Such report consists merely of a statement of the general features of the case, the judge's charge, and the verdict. The facts in brief were these: The deceased had been unjustifiably interfering for some time with the accused and his property, and had been on one occasion successfully prosecuted, criminally, therefor. He had subsequently threatened to visit the home of the accused and obtain satisfaction for his supposed wrongs. He armed himself with a club for that purpose to the knowledge of the accused. On the day of the homicide the latter, believing an attempt to inflict personal violence on him to be impending, and on advice of the chief of police that he had a right to defend himself with firearms if he believed his life to be in danger, obtained a gun with which to make such defense. Late in the evening thereafter the deceased visited the home of the accused, armed with his club, and made a vigorous assault therewith on the door, there being a number of people standing by. The accused immediately responded by opening the door and stepping outside the house armed with his loaded gun. As he did so, he notified the bystanders to clear the way as he was going "to shoot the

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fellow." The deceased retreated and the accused pursued. As the former, still retreating, stumbled in trying to enter a nearby house to escape his pursuer, the latter drew on him and fired, killing him instantly.

The judge instructed the jury that if the offense was not murder, and was not manslaughter in the third degree because not characterized by heat of passion impelling the deed and the use of a dangerous weapon, the accused was guilty of manslaughter in the fourth degree. That was merely the opinion of the judge of an inferior court, and very clearly, we should say, not safe to be followed.

The statutory offense of manslaughter in the fourth degree was, when the trial above referred to occurred, the same in New York as here. The same is likewise true as to manslaughter in the third degree. The distinguishing characteristic of the former is the element of involuntary killing. Heat of passion is common to both offenses, and while the use of a dangerous weapon is essential in the third degree it may also characterize the fourth. So the test given in *People v. Crowe, supra,* in view of the facts to which it was there applied, should not have found favor here. The idea that one armed with a loaded gun, proclaiming to another and bystanders a purpose to shoot such other, may pursue him, he retreating, and, upon a favorable opportunity presenting itself, draw on such other and shoot him to death, and the offense be in any reasonable view of the matter called involuntary homicide, manifestly cannot be. The judge in the New York case simply did not take note of the significance of the term *involuntary* in the definition of the offense of manslaughter in the fourth degree.

As to *Keenan v. State,* 8 Wis. 132, of which this court was made to say in *Schlect v. State,* 75 Wis. 486, 44 N. W. 509, the defendant was convicted of manslaughter in the fourth degree, and the facts were in many respects like those in the *Schlect Case,* the report shows that there was such similarity

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of facts, but that Keenan was convicted of manslaughter in the first degree instead of manslaughter in the fourth. This court is made to say that the ruling of the circuit court that the Keenan offense came within the fourth degree of manslaughter, was approved here on review. That clearly was a mistake. No such question was presented in the *Keenan Case.* The court there dealt with manslaughter in the fourth degree only in this wise: The trial court was requested to instruct the jury that every involuntary killing of another by any weapon in the heat of passion which is not declared to be excusable homicide is manslaughter in the fourth degree. The request was rejected, because it was not so framed as to exclude the element of cruel or unusual means. The statutory language on the subject was given to the jury instead by the trial judge and the ruling was approved.

It must be observed, in order to avoid error in such cases as this, that manslaughter in the third degree is defined as the killing of a human being in the heat of passion without a design to effect death, etc., while manslaughter in the fourth degree is defined to be an involuntary killing of a human being in the heat of passion, etc. The term *involuntary* signifies inadvertence. It is inconsistent with the wilful shooting of another with fatal effect. One may so wilfully shoot, pointing a gun at such other and discharging it purposely, yet not aim the weapon at a vital part of the body in the sense of a mental and physical operation to that end—though the presumption without explanation would be to the contrary—and so without necessarily a specific design to effect death. But such an act cannot be deemed involuntary within the meaning of our statute. It is said elsewhere that when one voluntarily shoots another fatally, the homicide cannot be deemed involuntary. *Smith v. State,* 73 Ga. 79; *State v. Cantieny,* 34 Minn. 1, 7, 24 N. W. 458. It follows that the court very properly refused to instruct the jury to consider the subject of manslaughter in the fourth degree.

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The next and last assignment of error which seems to merit attention relates to the trial court's exposition of the term *heat of passion.* It is claimed by counsel for the accused that the instruction was well calculated to give the jury an idea that, to satisfy the statute on that subject, the mental disturbance must be so great as to pass the boundary of intelligent action. Since there was evidence from which the jury might have found that the deceased was the attacking party, and that before and during the shooting he was abusing the accused in a highly exasperating manner, if the degree of mental disturbance necessary to reduce what would otherwise be a homicidal offense higher than that of manslaughter in the third degree to such degree was exaggerated by the trial court, the result may have been highly prejudicial to the accused. It may have resulted in his conviction of murder in the second degree punishable by confinement in the state prison from fourteen to twenty-five years (sec. 4344, Stats. 1898), when the conviction would otherwise have been of the offense of manslaughter in the third degree punishable by such confinement of from two to four years (sec. 4361, Stats. 1898).

The essentials of heat of passion, as the term is used in defining homicidal offenses, are not given in the authorities with that entire harmony which one would like to see respecting so important a matter. All, however, agree that the mental disturbance must be produced by such provocation as, reasonably, would ordinarily have that effect in case of an ordinary man, and actually had such effect in the given case. That is what is meant by the term *adequate provocation. Ryan v. State,* 115 Wis. 488, 92 N. W. 271; *Davis v. People,* 114 Ill. 86, 29 N. E. 192; *State v. Shippey,* 10 Minn. 223; *State v. Hoyt,* 13 Minn. 132; *Reg. v. Welsh,* 11 Cox C. C. 336; *State v. Grugin,* 147 Mo. 39, 47 S. W. 1058; *People v. Calton,* 5 Utah, 451, 459, 16 Pac. 902; *Brooks v. Comm.* 61 Pa. St. 352; 1 McClain, Crim. Law, §§ 337, 338. In 21 Am. &

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Eng. Ency. of Law (2d ed.) 177, the rule on this subject supported by many authorities cited is phrased thus:

"The provocation, in order to be sufficient in law, must be such as, naturally and instantly, to produce in the minds of persons, ordinarily constituted, the highest degree of exasperation, rage, anger, sudden resentment, or terror."

The trial court for some reason failed to give any explanation of this feature of the case in the instructions.

The degree of mental disturbance essential to heat of passion will be found variously stated in the authorities. Here and there it is stated thus mildly:

"Reason should, at the time of the act, be disturbed or obscured by passion to an extent that might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment." *Maher v. People,* 10 Mich. 212; *People v. Lilley,* 43 Mich. 521, 5 N. W. 982.

That has been referred to here, on at least one occasion, in a manner to suggest approval. *Perugi v. State,* 104 Wis. 230, 240, 80 N. W. 593. Generally language is used in the authorities calculated to suggest a still greater degree of disturbance, as for examples:

"Provocation . . . such as might naturally kindle ungovernable passion in the mind of an ordinary and reasonable man." *Reg. v. Welsh,* 11 Cox C. C. 336. "Heat of passion apparently sufficient to make the passion irresistible." *Davis v. People,* 114 Ill. 86, 29 N. E. 192. "Provocation . . . sufficient to excite an irresistible passion in a reasonable person, one of ordinary self-control." *People v. Hurtado,* 63 Cal. 288, 292. "Passion which for the moment the party is unable to control." *Nichols v. Comm.* 11 Bush, 575. "Passion producing the highest degree of exasperation." *Preston v. State,* 25 Miss. 383. Provocation engendering passion depriving the actor for the time being "of the power of self-control." Stephen, Dig. Crim. Law (6th ed.) art. 246. "Passion

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suspending the exercise of judgment and dominating volition so as to exclude premeditation and a previous formed design." *Smith v. State,* 83 Ala. 26, 3 South. 547. "Sudden impulse of overmastering passion." *McDuffie v. State,* 90 Ga. 786, 17 S. E. 105. To the same effect are 2 Bish. New Crim. Law, § 697; Desty, Am. Crim. Law, § 128*d; State v. Davis,* 50 S. C. 405, 422, 27 S. E. 905; *Brooks v. Comm., supra; People v. Calton, supra.*

The more emphatic manner thus indicated of stating the matter has found most favor here, as is indicated by *Hempton v. State,* 111 Wis. 127, 142, 86 N. W. 596; *Ryan v. State,* 115 Wis. 488, 92 N. W. 271. We are constrained to approve the idea that the heat of passion which will reduce what would otherwise be murder to manslaughter in the third degree, and which is specified inclusively or exclusively in the statutory definitions of other homicidal offenses, is such mental disturbance, caused by a reasonable, adequate provocation as would ordinarily so overcome and dominate or suspend the exercise of the judgment of an ordinary man as to render his mind for the time being deaf to the voice of reason: make him incapable of forming and executing that distinct intent to take human life essential to murder in the first degree, and to cause him, uncontrollably, to act from the impelling force of the disturbing cause, rather than from any real wickedness of heart or cruelty or recklessness of disposition. Uncontrollable passion in such circumstances is supposed to "sway the reason regardless of her admonitions," but it is not presumed to be, nor does the heat of passion spoken of contemplate, such overpowering disturbance as to destroy volition, the reasoning faculty, even temporarily. It is said that a transport of passion which deprives one of the power of self-control is, in a modified or restricted sense, a dethronement of the reasoning faculty, a divestment of its sovereign power, but an entire dethronement is a deprivation of the intellect for the time being. *Smith v. State, supra.*

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It was in the modified or restricted sense above indicated that the term *dethronement* was used in *Hempton v. State,* 111 Wis. 127, 143, 86 N. W. 596, as is clearly indicated by the context. It was said in that case:

"Now, if from passion . . . a person, for the moment, is unable to exercise his reason, and while he is in such condition, though conscious of what he is doing and not so completely bereft of reason as to be legally irresponsible, he is uncontrollably moved thereby to and does wrongfully kill another, he cannot be convicted of murder in the first degree. . . . If reason, notwithstanding the . . . disturbing cause, *be not so completely dethroned, so to speak,* but that the wrongdoer can exercise judgment, he must do so or pay the penalty of being held responsible for his acts regardless of such disturbing cause."

The disturbing cause in the particular case was intoxication, but it was said that the rule was the same as in case of uncontrollable condition through anger, terror, or any other adequate cause.

It is believed that the exposition thus given is strictly accurate, though it is now regretted that the term *dethronement* was used at all. While it was considerately and designedly guarded so as to avoid conveying the impression of more than temporary control or displacement of judgment, not a deprivation of reason, strictly so called, it seems—as perhaps ought to have been appreciated—that the clear distinction and the evident effort to make it significantly plain is not wholly appreciated.

In *Smith v. State,* 83 Ala. 26, 3 South. 547, the trial court used the term, "this heat of blood must be such as to entirely dethrone reason, and the assault be made in consequence of" such heat of blood. And the conviction was set aside on that ground.

In *State v. Hill,* 4 Dev. & Bat. Law, 491, 496, the jury were instructed, in effect, that if reason was not so destroyed but that the accused was possessed of sufficient power of de-

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liberation and reflection to be sensible of what he was about to do, and did the act intentionally, he was guilty of murder. The conviction was set aside because the instruction tended to mislead the jury into believing that the passion which rebuts the imputation of murder from the unlawful killing "must be so overpowering as, for the time, to shut out knowledge and destroy volition." That case is found most universally cited in support of condemnations of the use of the term *dethronement of reason* in defining heat of passion. In *Young v. State,* 11 Humph. 200, the instruction treating of manslaughter was in these words: "If the jury should believe that the deceased was advancing upon the prisoner with a stick, threatening to beat him, and such assault excited in the prisoner a sudden burst of passion, and, for the time being, dethroned his reason, and he shot and killed in this whirlwind of passion, it would be manslaughter." And the conviction was set aside on that ground. To the same effect are *Maher v. People,* 10 Mich. 212, 220; *Haile v. State,* 1 Swan, 248; *State v. Davis,* 50 S. C. 405, 27 S. E. 905; *People v. Calton,* 5 Utah, 451, 16 Pac. 902; Clark, Crim. Law, 167; 2 Bish. New Crim. Law, § 697; 21 Am. & Eng. Ency. of Law (2d ed.) 174.

From the foregoing it will be seen that the heat of passion of the statute on the subject of criminal homicide, while it involves deprivation of self-control by exercise of judgment: passion irresistible, or, in other words, a disturbed mental condition, caused by passion, incapacitating the person from forming and executing a distinct intent to take human life, is not inconsistent with intelligent action, with consciousness of what one is doing and of the responsibilities therefor; it is not such as to, temporarily even, dethrone reason, strictly speaking: destroy volition.

It may be that a jury would not, ordinarily, fully appreciate the distinction between temporary dethronement of reason and such temporary domination of judgment by an irresistible impulse of passion as to render the mind deaf, so to speak, to

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the voice of reason, but the distinction is clear in the law, and, in dealing with matters of such supreme importance as human liberty on the one side and the safety of society on the other, it will not do to overlook it or to pass it by as nonprejudicial in case of the distinction being lost sight of in instructing the jury in such a case as this. A guilty man had better go free or be convicted of something less than his deserts, as a choice between such freedom or conviction on the one hand and a conviction of what he is really guilty of on the other, unless the latter can be regularly reached by way of the due administration of the law of the land.

In the light of the foregoing little more need be said to show that the judgment complained of must be reversed than to quote the only instruction which the court gave on the subject of manslaughter in the third degree, except to recite the statutory definition. This is the instruction:

"Heat of passion as used in this section means something more than mere anger or irritation. It means passion: such passion as amounts to a temporary dethronement of reason, and rendering the slayer incapable of forming a deliberate, premeditated design to kill; passion engendered by provocation; provocation to that degree that the heat of passion thereby engendered was so great as to amount to temporary dethronement of reason and rendering the slayer incapable of forming the deliberate, premeditated design to kill. If he is capable of forming and does form and execute such design or intent unlawfully, it is murder in the first degree although he may have received some provocation and acted under some passion."

We do not fail to note what the learned attorney general called to our attention, regarding the term *dethronement of reason* being immediately followed in the conjunctive by the idea of incapacity to form a distinct intent to kill. Such idea, as phrased and expressed, was not used as it might have been in the way of an explanatory or modifying clause. Had it been so used, possibly the case might be saved. It were better, however, had it not been used at all. The learned court in-

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stead of saying temporary dethronement of reason, *to the extent of or in the sense of rendering the slayer incapable,* etc., *ex industria* used that which might easily have been made, as indicated, a modifying clause, in such a way that the jury may well have regarded it rather as the ordinary consequence to be expected from dethronement of reason strictly so called. The error was intensified, it seems, by omission to explain the nature of the provocation essential to the heat of passion of the statute, and the repetitious use of the term *deliberate, premeditated design,* a term not found in our statute on the subject of homicide: one suggesting, necessarily, some period of time for deliberation and thought, as sometimes held to be necessary under statutes containing such terms as deliberate, premeditated, or wilful, deliberate, premeditated. *Cupps v. State,* 120 Wis. 504, 532, 97 N. W. 210, 98 N. W. 546. Our statute only uses the term *premeditated design* and does that as synonymous with previously formed design, not suggesting any necessary element of lying in wait, or a period of deliberating on the execution of the intent.

By the Court.—The judgment is reversed, and the cause is remanded for a new trial. The warden of the state prison will surrender the plaintiff in error to the sheriff of Milwaukee county. He will hold him in custody until he shall be discharged or his custody changed by due course of law.

THE STATE EX REL. BERGH, Commissioner of Banking, vs. SPARLING and others, Civil Service Commissioners.

May 11—June 21, 1906.

Civil service act: Unclassified service: Department of banking: Constitutionality of act.

1. Pursuant to the power given by the amendment to secs. 4, 5, art. XI, Const., "to enact a general banking law for the creation of banks and for the regulation and supervision of the

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banking business, provided that the vote of two thirds of all members elected to each house be in favor of the passage of such law," the legislature enacted a general banking law (ch. 234, Laws of 1903) and therein, as a part of the scheme for the control of the banking business, created a banking department, to be in charge of a commissioner of banking. *Held*, that the creation of such department required the affirmative vote of two thirds of all members elected to each house of the legislature, and that the officers and employees of such department are therefore within the unclassified civil service of the state, under the provision of sec. 8, ch. 363, Laws of 1905, that such unclassified service shall comprise "all officers and employees in any department for the creation of which a vote of two thirds of all members elected to each house is required."

2. In a proceeding by the commissioner of banking to prohibit the enforcement of the civil service law against officers and employees of the banking department, it being held that such officers and employees are not subject to said law, the question of the constitutionality of the law is not considered.

PROHIBITION to the civil service commissioners of the state. *Absolute writ issued.*

This is an original action in this court. It was brought by the relator, who holds the office of commissioner of banking, upon leave granted him by the court. It is alleged that the relator is the duly appointed and acting commissioner of banking under the authority of ch. 234, Laws of 1903, which, pursuant to the amendment of secs. 4 and 5, art. XI, of the constitution of the state, provides for the creation of banks and for the regulation and supervision of the banking business, and that his deputy, the examiners, and the clerks of the banking department are in the possession and performing the duties of the respective offices and positions created and imposed by the provisions of the act. It is further alleged that the defendants are the civil service commissioners of this state, that they are exercising the powers and duties imposed on them by ch. 363, Laws of 1905, and that they have made demand upon the relator and all other persons now holding offices and positions in the banking department, as incumbents of such offices and positions within the classified service of

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this state under its provisions, to comply with all the terms and conditions of the civil service law, and that they threaten to subject the examiners and clerks of the department to the examination prescribed by it as a requisite to entitle them to continue in the employ of the state, and that, in case of relator's refusal, as an appointing officer under its terms, and the refusal of the employees of the state in this department, as employees within the jurisdiction of its provisions, to comply with the provisions of this law, the commission threatens to enforce as against the relator and such officers and employees of this department the penalties provided therein for failure to conform to them and to comply with the conditions imposed upon persons within the classified civil service of the state. It further alleges that this threatened enforcement of the civil service law as to this department would prevent the enforcement of the regulations and the supervision of the banking measures of this state as prescribed by law, and cause great and irreparable injury to the public and the state. Relator therefore demands that the civil service commission be prohibited from enforcing the provisions of the law as regards himself, as commissioner of banking, and all other persons in the employ of the state in the state banking department.

The defendants demurred to the relation and moved to quash it, upon the ground that it appears upon the face of the relation that the facts stated allege no grounds for the issuance of the writ of prohibition, that the facts stated show that defendants are vested with authority and power to carry out the provisions of ch. 363, Laws of 1905, and that the relator and all other officers and employees in the banking department of the state are subject to their jurisdiction, as persons holding offices and positions of trust or employment in the classified civil service of the state within the terms and provisions of this law.

R. M. Bashford, for the relator.

For the defendants there was a brief by the *Attorney Gen-*

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eral and *A. C. Titus,* assistant attorney general, and a separate brief by *Olin & Butler,* of counsel; and the cause was argued orally by the *Attorney General* and *J. M. Olin.*

There was also a brief on behalf of the State Civil Service Reform Association by *Edward W. Frost,* attorney.

SIEBECKER, J. Upon the demurrer to the relation and the motion to quash it, the contention is made that it appears from the facts alleged that no sufficient grounds are presented for the issuance of a writ to prohibit the defendants, as civil service commissioners, from proceeding to enforce the provisions of ch. 363, Laws of 1905, against relator and all the other officers and employees of the banking department, as within the classified civil service of the state under the terms and provisions of the act. It is obvious that the legislature has undertaken to classify the civil service of the state and to provide for appointment to and promotion therein according to merit and fitness, to be ascertained, so far as practicable, by appropriate competitive examinations, and to that end created a civil service commission, charged with the duties and powers necessary to carry into effect the provisions of this act. The jurisdiction of this commission extends to and covers the prescribed classified civil service. Appointments in the unclassified civil service are not subject to the terms and conditions of the act. Relator avers that under sec. 8 of the act all officers and employees in the state banking department are within the unclassified civil service of the state. This section provides: "The civil service shall be divided into the unclassified service and the classified service. The unclassified service shall comprise," among others, "all officers and employees in any department for the creation of which a vote of two thirds of all members elected to each house is required." It must then be determined whether relator and the other officers and employees serving in the banking department of the state, as created and established by ch. 234, Laws of 1903, are within

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the unclassified civil service. This act is entitled: "An act for the creation of banks and for the regulation and supervision of the banking business." It is manifestly enacted pursuant to the calls of the amendment to secs. 4 and 5, art. XI, of the state constitution, ratified and adopted in 1902, which is as follows:

"Sec. 4. The legislature shall have power to enact a general banking law for the creation of banks, and for the regulation and supervision of the banking business, provided that the vote of two thirds of all members elected to each house, to be taken by yeas and nays, be in favor of the passage of such law."

The intent and scope of this provision are obvious from the language employed, which imports that the people thereby expressly delegated to the legislature the power to create banks and to provide for their regulation and supervision. The occasion for such specific delegation of power by the people to the legislature is manifest from the history of these constitutional provisions. Originally the people reserved to themselves the control of the creation of banks under the provisions of secs. 4 and 5, art. XI, of the constitution, which declared that: "The legislature shall not have power to create, authorize, or incorporate, . . . any bank, or banking power or privilege, or any institution or corporation having any banking power or privilege whatever," except with the consent of the people expressed by ballot, and then any law granting such power should be inoperative until approved by a vote of the electors at a general election. These provisions were abrogated by the adoption by the people of the above amendment at the general election in 1902, whereby unrestricted power over the subject of banking was given to the legislature, both in respect to the creation of banks and the regulation and supervision of the banking business.

The first legislative action, exercising the right to frame laws under the power thus conferred, is embodied in ch. 234,

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Laws of 1903, which provides for the creation and maintenance of banks and the supervision of the banking business. It seems that the legislature intended to cover these subjects in detail and to provide a legislative scheme for the exercise of the powers conferred by the constitutional amendment. As a part of the general plan and scheme to accomplish this purpose, subch. 1 of this act establishes "a banking department, which shall have charge of the execution of the laws relating to banks and the banking business," and which is to be "under the management and control of a chief officer who shall be called the commissioner of banking," who is given power to appoint a deputy, examiners, and clerks to assist in the administration of the affairs of the department. In other parts of the act power is expressly conferred on the commissioner to examine annually "the cash, bills, collaterals, securities, books of account, condition and affairs of each bank, and mutual savings bank doing business in this state, except national banks." For this purpose he may administer oaths to persons to be examined by him, and determine whether banks do their business at the places fixed by their charters and according to prescribed regulation. He is given power to demand of any bank that it make good any impairment or deficiency in its capital stock, and, in case of noncompliance with his demand, he is to make report thereof to the attorney general of the state to secure the appointment of a receiver and the winding up of the bank's affairs. He is also authorized to take possession of a bank's books, records, and assets whenever it unlawfully refuses to pay its depositors in accordance with the terms on which their deposits were made, or if the bank is insolvent, and to hold them until they can properly be turned over to a receiver. In all cases where banks fail to keep books and accounts in such a manner as to enable him to readily examine and ascertain their condition, he is empowered to prescribe the keeping of such books and accounts as shall be necessary to record the transactions of the banks, and, whenever

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the banking business of different banks is conducted in such close proximity as to interfere with their proper examination or supervision, he may require any of such banks to remove its banking offices to some other location. It is made his duty to make a full report each year to the governor; such report exhibiting the condition of the various banks as to amount of capital returned by them, their liabilities and total resources, and giving other information, as required, pertaining to the banking business of the state.

It is evident from these and kindred provisions of this act that the creation of the banking department and the establishment of the office of commissioner of banking was designed and intended as part of a general banking law for the creation of banks and for the regulation and supervision of the banking business. The powers so conferred afford the strongest evidence that the establishment of the department with the commissioner in its charge is a part of the general scheme and purpose of the legislature to accomplish the purposes and to exercise the power conferred by the constitutional provision. It is not suggested that the scheme thus adopted is not an appropriate method for attaining effective regulation and supervision of the banking business. It seems that a proper administration of these powers requires an instrumentality like this department to carry out efficiently the legislative action on this subject, and that this makes it an integral and necessary part of the legislative scheme for the control of the banking business. Upon these considerations the conclusion seems inevitable that the creation of this department, with the office of commissioner of banking, by ch. 234, Laws of 1903, required the affirmative vote of two thirds of all members elected to each house of the legislature in favor of the passage of the law, and that the department officers and employees are embraced in the unclassified civil service of the state, as prescribed by ch. 363, Laws of 1905, and hence are not subject to the power, duties, and authority vested in the civil service

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commission. Defendants therefore cannot subject them to their jurisdiction and must be prohibited from enforcing the provisions of the act, as threatened, against them.

The questions suggested upon the argument and fully presented in the respective briefs of counsel, as to whether or not the provisions of the civil service act are violative of any constitutional provisions, require no discussion here, since relator is not subject to the provisions of the act and can in no sense be affected or injured by the enforcement of its provisions.

By the Court.—Judgment is ordered that an absolute writ of prohibition issue forthwith, commanding the defendants, as members of the state civil service commission, to absolutely refrain from proceeding to enforce any of the powers vested in them by ch. 363, Laws of 1905, or any of the penalties prescribed by this act, against relator or any other officer or employee in the banking department of the state,—without costs; the relator to pay the fees of the clerk of this court.

BUSSE, Plaintiff in error, vs. THE STATE, Defendant in error.

May 12—June 21, 1906.

Bastardy: Paternity of child: Intercourse with several men: Trial by court: Conviction contrary to evidence: Reversal.

1. In a bastardy proceeding paternity cannot be established beyond reasonable doubt against the defendant if it appears that the prosecutrix had intercourse with another man at a time consistent with the latter's responsibility for the pregnancy. A clear preponderance of the evidence in this case is *held* to establish such intercourse.
2. A conviction by the court without a jury in a bastardy proceeding will be reversed if contrary to a clear and definite preponderance of the evidence.

ERROR to review a judgment of the municipal court of Dane county: E. RAY STEVENS, circuit judge, sitting for the municipal judge. *Reversed.*

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Plaintiff in error, upon trial to the Dane county municipal court without a jury, was convicted of being the father of the illegitimate child of complaining witness, and adjudged to pay $100 to her, besides the costs of the proceeding, and $6 per month until the child should attain the age of seven years. He brings this writ of error to review such judgment.

John A. Aylward, for the plaintiff in error.

The *Attorney General* and *J. E. Messerschmidt,* law examiner, for the defendant in error.

DODGE, J. Paternity cannot be established against defendant beyond reasonable doubt if it appear that the prosecutrix had intercourse with another man at a time consistent with the latter's responsibility for her pregnancy. Under such circumstances the law refuses to recognize the ability of the mother or any one else to know with any sufficient measure of certainty that defendant is in fact the parent. *Baker v. State,* 47 Wis. 111, 2 N. W. 110. The period for conception in this case extended, according to expert testimony, from about July 27 to about September 15, 1904; mid-August being the most probable time, since the birth, entirely normal and mature, occurred May 23, 1905.

Refraining from details of evidence as to general persistency through July and into September of practically conceded libidinous relations theretofore existing between prosecutrix and one Walter Busse, while she was housekeeper or domestic servant in defendant's farmhouse, we shall rest our decision upon one specific event which we think is shown conclusively to have occurred within the period mentioned. The particular occasion was on a Sunday, marked by defendant's absence from home. Walter spent the day in company with prosecutrix in the house, and, without rehearsing the testimony, we can understand her only as admitting intercourse on that occasion—at most, offering denial merely as to its frequency. There seems to be no doubt or dispute as to the identity of

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this particular occasion, but merely as to its date. Prosecutrix declares that it was in July, some time after the Fourth, because she knew they had no sexual relations after July, an often reiterated statement. Some other witnesses can only say it was in July or August. One Cossibone, however, a hired man, has definite data; for he did not commence work on the farm until August 11th, and this Sunday episode occurred after that date. There is nothing to cast doubt on his statement except prosecutrix's testimony, given, as she admits, after being warned by her counsel that intercourse with any other than accused after July would be fatal to the action, and with recognition of the fact that none of the men whose intimacy with her was shown or charged was of any financial responsibility except the accused. She was shown to be of low and loose moral character. She was contradicted on many subjects by numerous witnesses. Her testimony that sexual relations with Walter terminated in July was discredited by full proof of continuance of their intimacy, so far as observable, and of his frequent visits to and stay in her bedroom at night, of which there was hardly attempt at concealment or disguise. In this situation we cannot think that her quite indefinite and argumentative assertion that this Sunday orgy with Walter did not take place in August can be accepted as at all credible against the definite and unassailed testimony of Cossibone. It has often been held that the testimony of even disinterested and unimpeached witnesses on the subjects of measurements, distances, dates, and the like, which is based merely on memory, estimate, or casual observation, must yield to that which is based on actual measurement or reference to definite data. *Burroughs v. Milwaukee,* 110 Wis. 478, 483, 86 N. W. 159; *Koepke v. Milwaukee,* 112 Wis. 475, 481, 88 N. W. 238; *Konkel v. Pella,* 122 Wis. 143, 146, 99 N. W. 453. Much more must such testimony yield when given by a highly interested witness, under temptation of pecuniary interest, of low character, and proved recklessness of statement.

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This is not a jury case, where a verdict must stand if supported by any credible evidence (*Peat v. C., M. & St. P. R. Co.* 128 Wis. 86, 107 N. W. 355), but a finding by the court which we must reverse if in opposition to a clear and definite preponderance of the evidence. Indeed, there is not even any finding as to the date of this occasion. If, as we think and hold, it took place in August, the court could have been convinced of defendant's paternity beyond reasonable doubt only by ignoring the rule of law first above stated or by overlooking the fact that prosecutrix in effect conceded intercourse at this Sunday visit, trying to make such admission consistent with denial of any such relations subsequent to July, by locating its date in that month. We cannot escape the conclusion that clear preponderance of evidence establishes sexual intercourse with a man other than the accused at a time consistent with such other's paternity of this illegitimate child, and that plaintiff in error cannot, beyond reasonable doubt, be found guilty.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in favor of the defendant.

PAETZ, Plaintiff in error, vs. THE STATE, Defendant in error.

May 12—June 21, 1906.

Intoxicating liquors: Sale without license: Punishment on second conviction: Pleading: Evidence: Statute construed: "During any year."

1. Under a complaint charging sale of liquor without a license, but not alleging a former conviction, evidence was not admissible to show such a conviction for the purpose of subjecting the accused to the heavier punishment imposed by statute in case of a second conviction during any year.
2. The admission of such evidence, when offered by the state in making its case, cannot be justified on the ground that it

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tended to affect the credibility of the accused as a witness, he then not having testified; and his subsequent testimony, on cross-examination, as to such former conviction did not cure or waive the error.

3. The words "during any year" in sec. 1550, Stats. 1898 (providing for the punishment in case of a second conviction of the same person during any year), mean during the ensuing period of 365 days after the date of the first conviction.

ERROR to review a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

On the 26th day of January, 1904, the plaintiff in error was convicted in the circuit court for Dane county of the offense of selling intoxicating liquor in violation of sec. 1550, Stats. 1898, and was sentenced to three months' imprisonment in the county jail and to pay a fine of $50 and costs. The complaint set out three causes of action and charged the plaintiff in error in each with selling intoxicating liquor at various times between the 20th day of July and the 25th day of August, 1903, without having first obtained a license. The complaint makes no reference to any former conviction. A stay of execution of sentence was granted and the record removed to this court by writ of error.

John A. Aylward, for the plaintiff in error, contended, *inter alia,* that this was not a second conviction "during any year." The word "year" means a calendar year unless otherwise expressed. Sec. 4971, Stats. 1898. A calendar year is the period commencing January 1 and ending December 31. *David v. Hardin Co.* 104 Iowa, 204, 73 N. W. 576; *Atlanta & C. A. L. R. Co. v. Ray,* 70 Ga. 674, 676; *Garfield v. Hubbell,* 9 Kan. App. 785, 59 Pac. 600; *Brown v. Anderson,* 77 Cal. 236, 19 Pac. 487; *Disbrow v. Saunders,* 1 Denio, 149; *Glasgow v. Rowse,* 43 Mo. 479; *Garfield v. Samuel Dodsworth B. Co.* 9 Kan. App. 752, 58 Pac. 565; *State ex rel. Buchanan v. State Treasurer,* 68 S. C. 411, 47 S. E. 683. If the term is to be otherwise construed because of the subject to which the statute relates, it must refer to the license

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year, beginning on the second Tuesday in July. Sec. 1549, Stats. 1898. On either theory the second conviction was not in the same year as the first. The rule of construction under which "year" may be held to mean license year was applied in *State ex rel. Buchanan v. State Treasurer,* 68 S. C. 411, 47 S. E. 683; *Glasgow v. Rowse,* 43 Mo. 479, 487; *Disbrow v. Saunders,* 1 Denio, 149; *Thornton v. Boyd,* 25 Miss. 598; *Williams v. Bagnelle,* 138 Cal. 699, 72 Pac. 408, 410; *U. S. v. Dickson,* 15 Pet. 141, 159.

For the defendant in error there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and *F. L. Gilbert,* district attorney, of counsel, and oral argument by *Mr. Titus.* As to the meaning of the words "during any year," they cited *U. S. v. Dickson,* 15 Pet. 141; *Bast v. Byrne,* 51 Wis. 531; *Disbrow v. Saunders,* 1 Denio, 149; *Thornton v. Boyd,* 25 Miss. 598, 604; *Williams v. Bagnelle,* 138 Cal. 699; *Brown v. Anderson,* 77 Cal. 236; *Knode v. Baldridge,* 73 Ind. 54; *Paris v. Hiram,* 12 Mass. 262; *Ward v. Sweeney,* 106 Wis. 44; *Glasgow v. Rowse,* 43 Mo. 479; *Meade Co. Bank v. Reeves,* 13 S. Dak. 193.

KERWIN, J. 1. Error is assigned because the court admitted evidence of a former conviction, the same not having been pleaded. The question arising under this assignment of error is whether upon a complaint charging sale of intoxicating liquor without having first obtained a license, in the absence of an allegation in the complaint of a former conviction, evidence on the part of the state was admissible to prove such former conviction for the purpose of subjecting the accused to the higher grade of punishment imposed by the statute. The statute under which plaintiff in error was convicted (sec. 1550, Stats. 1898) provides for a fine of not less than $50 nor more than $100 and costs, or, in lieu of such fine, imprisonment in the county jail not to exceed six months nor less than three months; and further provides: "In case of a

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second or any subsequent conviction of the same person during any year the punishment shall be by both such fine and imprisonment." The case was tried upon the theory that the complaint was sufficient to warrant conviction and sentence for a second offense, under which evidence was admitted over objection of a former conviction.

The plaintiff in error was found guilty and sentenced to punishment as for a second offense. The complaint was clearly insufficient to warrant proof or conviction of a second offense. As has been seen, a conviction for a second offense subjected the plaintiff in error to a more severe punishment than conviction for a first offense. It is contended on the part of the state that the proof of former conviction did not go to the question of guilt or innocence of the plaintiff in error, but only to the severity of the punishment; hence that there was no necessity for any allegation of former conviction in the complaint. But the accused was entitled to be informed of the nature of the charge against him, and, since a greater punishment is imposed upon a second conviction, prior conviction was an essential element of the offense in a prosecution for a second offense. The complaint, therefore, was insufficient to admit proof of former conviction. This doctrine appears to be so well established that we deem discussion of it wholly unnecessary. The following are some of the many authorities in support of the doctrine that, where the statute provides a heavier penalty for the second offense, the first must be alleged in the indictment and proved upon the trial in order to warrant conviction and punishment for a second offense: Wharton, Crim. Pl. & Pr. (9th ed.) § 934; 1 Bishop, New Crim. Proc. §§ 77, 101; Bishop, Stat. Crimes (3d ed.) § 981; Clark, Crim. Proc. § 84; 12 Cyc. 950; Hochheimer, Crim. Law (2d ed.) § 104; *Johnson v. People,* 55 N. Y. 512; *People v. Sickles,* 156 N. Y. 541, 51 N. E. 288; *Hines v. State,* 26 Ga. 614; *Evans v. State,* 150 Ind. 651, 50 N. E. 820; *Comm. v. Harrington,* 130 Mass. 35; *Fossdahl*

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v. State, 89 Wis. 482, 62 N. W. 185. It is very clear from the foregoing authorities that under the complaint the plaintiff in error could not be convicted and punished as for a second offense; therefore, regardless of the question of whether the evidence was competent for any purpose, the judgment must be reversed, and the question arises whether upon the record the plaintiff in error should have been punished as for a first offense. The admission of evidence of former conviction is attempted to be justified by counsel for the state on the theory that it was offered for the purpose of showing a prior conviction only, and not on the question of guilt or innocence of the plaintiff in error of the offense charged, and further that it was admissible as tending to affect the credibility of the accused as a witness. But the difficulty with this contention is that the state proved, over objection, the former conviction in making its case, and the testimony at that stage of the proceeding was clearly inadmissible under the complaint for any purpose, hence was reversible error. *Paulson v. State,* 118 Wis. 89, 94 N. W. 771.

It appears from the record that the plaintiff in error on cross-examination, over objection, testified to the former conviction; but upon the whole record we are satisfied that this was not sufficient to cure or waive the error committed by proof on the part of the state of such conviction in making out its case. The plaintiff in error was not obliged to go upon the stand in his own defense, and he may have been forced to do so in consequence of the improper testimony admitted on the part of the state. It cannot be said that he was not prejudiced by the admission of such highly prejudicial evidence on the part of the state from the fact that testimony of former conviction was drawn out upon cross-examination. *Paulson v. State, supra.*

2. Error is assigned because the plaintiff in error was sentenced for a second offense, on the ground that the proof does not show a prior conviction within the time contemplated by

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the statute. The statute provides that "in case of a second or any subsequent conviction of the same person during any year the punishment shall be by both fine and imprisonment." Stats. 1898, sec. 1550. The evidence tends to prove that the plaintiff in error was convicted on July 3, 1903, and the record shows that he was convicted of a second offense January 26, 1904, and it is insisted by counsel for plaintiff in error that the second offense was not within the time contemplated by the statute. Counsel contends that the words of the statute "during any year" mean a calendar year, and, therefore, the conviction not being within the same calendar year, there was no second conviction within the meaning of the statute. The argument of counsel upon this assignment of error is able and ingenious, but we cannot adopt his conclusions. We are of opinion that the year contemplated by the statute is a period of 365 days, and that a second conviction within that period is within the statute. If the contention of counsel be correct, a person convicted of a first offense the latter part of December one year and of a second the fore part of January the following year could not be punished upon a second conviction as for a second offense within this statute. We do not think such is a proper construction of the statute. We think that the words "during any year" mean the ensuing year from the date of the first conviction. *U. S. v. Dickson,* 15 Pet. 141; *State v. Adams,* 64 N. H. 440, 13 Atl. 785.

Other errors assigned need not be considered, since the questions presented under them are not likely to arise upon another trial.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

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STATE EX REL. PABST BREWING COMPANY VS. CARPENTER, County Judge, and another.

May 12—June 21, 1906.

Taxation: Inheritances: Determining value: Powers of county court: Compelling corporation to produce books, etc.

Ch. 44, Laws of 1903, imposing a tax upon inheritances and authorizing the county court, with or without the appointment of an appraiser, to ascertain and determine the value of the estate, and for that purpose to compel the attendance of witnesses, etc., does not empower the court to compel a corporation in which the decedent was a stockholder to produce its private books and papers in court to aid in determining the value of the stock so held.

PROHIBITION to the county court of Milwaukee county: PAUL D. CARPENTER, County Judge. *Peremptory writ awarded.*

This is an alternative writ of prohibition issued by this court to the county court of Milwaukee county, March 28, 1906. It appears from the verified petition for and the return to the writ that Frederick Pabst of Milwaukee died testate January 1, 1904, leaving a very large estate. His will was admitted to probate February 3, 1904, and executors appointed and qualified. The executors filed an inventory of said estate showing, among other things, that said deceased at the time of his death was the owner and holder of 1,918 shares of the capital stock of the said relator of the face value of $1,000 per share. December 29, 1904, the executors presented to the county treasurer a statement of the property belonging to said estate, with provisional valuations and a computation of the amount due the state for the tax prescribed by ch. 44, Laws of 1903, and paid the same to such treasurer, subject to correction and readjustment on final determination, and without waiver of the right to insist on the return of the same in case the act should be held to be invalid, and

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took a receipt duly countersigned for the amount so paid. December 14, 1905, the county court, on petition of the secretary of state, therein ordered that February 1, 1906, or as soon thereafter as said petition could be heard, the matters therein should be heard before said county court, without the appointment of any appraisers, at the courthouse in Milwaukee, at which time and place the county court would hear evidence and determine the cash value of said estate and the amount of such inheritance tax. Thereafter, and upon such hearing, the value of said stock was in controversy. Without offering other evidence the state demanded the production of the books and records of the relator, and on March 19, 1906, a subpœna was served upon the secretary of the relator requiring him to appear before said county judge on the next day and then and there give evidence on behalf of the state in said matter, and then and there to have "the trial balances made out and prepared by the *Pabst Brewing Company* about January 1, 1903, and January 1, 1904, and all the books of account, cash books, ledgers, stock books, and other books, papers, and documents from which said trial balances were made out or prepared and belonging to said company." A subpœna was also issued and served upon the president of said corporation, who was also one of the executors of said will, requiring him to appear at the same time and place, and then and there to have "all the private books of account kept by said Frederick Pabst and all papers and certificates of stock and other documents bearing upon or relating to the stock of the *Pabst Brewing Company* owned by said Frederick Pabst and all books of account kept by the executors of the last will and testament of said Frederick Pabst, deceased."

At said hearing the said executor did have, and was ready to produce, all the books and papers mentioned in said last subpœna issued to said executor. The state then and there demanded the production of the books and papers mentioned in the first subpœna so issued to the relator's secretary for the

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purpose of using the same as evidence in said matter. The relator then and there objected to such production and use and claimed that the said county court had no right to require the same. The relator alleges that under the act mentioned the inheritance tax prescribed was to be laid upon the fair market value of such stock; whereas, the only value which could be established from such books and papers would be the book value thereof, which is not the market value thereof and is not material or pertinent upon the inquiry before the county court, but that upon such hearing said executors offered to produce the trial balances for several years prior to the death of the deceased; that the relator is a corporation with a capital stock of $10,000,000 owned by about twenty stockholders, and does business and owns property in nearly all the states of the Union; that to submit all its books and papers to inspection and expert investigation would be a grievous burden and great expense to the relator, and would not tend to establish the market value of its stock or the value upon which such inheritance tax should be calculated. The relator claims that the county court had no jurisdiction to compel the production of its books and papers for the inspection of expert bookkeepers or counsel for the state, and also denies the validity of the act mentioned.

The county court overruled each and all of such objections and claims made by the relator. The alternative writ of prohibition commands the county court to desist from further proceedings to compel the relator to produce its books and papers upon the appraisal of the estate of the deceased, and to show cause why the peremptory writ should not issue as prayed.

For the relator there was a brief by *Winkler, Flanders, Smith, Bottum & Fawsett,* attorneys, and *Hugh Ryan,* of counsel, and oral argument by *Mr. F. C. Winkler* and *Mr. Ryan.* They argued, among other things, that this is a new law imposing special and onerous burdens in addition to general taxes. It is not to be extended beyond the express terms

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of its provisions. *In re Enston,* 113 N. Y. 174, 177, 178; *In re Bishop,* 82 App. Div. 112, 116. Inquisitorial methods can be justified no further than they are authorized by positive law. The facts sought to be shown can be readily proven by the testimony of witnesses. The books of the corporation are not competent or original evidence against the executors or those whom they represent in this proceeding. If the assets and liabilities of a third person are a material fact to be determined in the controversy in the county court, the statements which that party has made upon his private books on the subject are not competent evidence. It is mere hearsay. And of course it matters not that the third person is a corporation. The facts must be proven by testimony under oath. These rules would govern if the appraisal were a regular judicial proceeding. They become more emphatic when it is remembered that the county court in making this appraisal acts in the capacity of an "assessing or taxing officer" only. Our law is taken from New York; and it was so held by the highest authority in that state. *Estate of Wolfe,* 137 N. Y. 205; *Weston v. Goodrich,* 86 Hun, 194; Dos Passos, Inheritance Tax Law (2d ed.) § 50. That a corporation will not be ordered to open and submit its books and papers to examination in an action or proceeding to which it is not a party, see *Henry v. Travelers' Ins. Co.* 35 Fed. 15; *In re Horgan,* 97 Fed. 319; *Southern R. Co. v. N. C. Corp. Comm.* 104 Fed. 700. We do not deny the efficiency of a subpœna *duces tecum* to compel a third person to produce a document or written instrument of any kind in his possession which is material to litigants. But we do submit that it must be an instrument or writing which has probative force upon the controversy in litigation. These books, as evidence of what property the corporation owned or what it was worth, stand upon the same footing with the official report of the officers of a national bank to the comptroller of the currency, which proves nothing. *Patterson v. Plummer,* 10 N. Dak. 95, 86 N. W. 111.

The *Attorney General,* and *T. C. Richmond,* special coun-

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sel, for the defendants. They contended, *inter alia,* that in the absence of a known market value the proper method of proving the market value of corporate stock is by proof of its actual value. 2 Cook, Corp. (5th ed.) § 581; 1 Spelling, Priv. Corp. § 499; *Greer v. Lafayette Co. Bank,* 128 Mo. 559; *Brinkerhoff-Farris T. & S. Co. v. Home L. Co.* 118 Mo. 587; *State ex rel. v. Carpenter,* 51 Ohio St. 83; *Freon v. Carriage Co.* 42 Ohio St. 30; *Beaty v. Johnston,* 66 Ark. 529; *Hitchcock v. McElrath,* 72 Cal. 565; *Hewitt v. State,* 118 Mo. 463; *McDonald v. Danahy,* 196 Ill. 133, 63 N. E. 648; *Moffitt v. Hereford,* 132 Mo. 513, 34 S. W. 252; McElroy, Transfer Tax Law of N. Y. § 317; *Estate of Brandreth,* 59 N. Y. Supp. 1092. To aid in determining such value in this case the county court has jurisdiction to order the production of the books of the relator corporation. As to the authority of a court to compel a corporation not a party to produce its books, see *Wertheim v. Cont. R. & T. Co.* 15 Fed. 716; *Johnson S. St. R. Co. v. North B. S. Co.* 48 Fed. 191; *Kirkpatrick v. Pope Mfg. Co.* 61 Fed. 46; *In re Hirsch,* 74 Fed. 928. In other cases the doctrine of the *Wertheim Case,* above cited, in its broadest application, is seemingly doubted. *Southern R. Co. v. N. C. Corp. Comm.* 104 Fed. 700; *Henry v. Travelers' Ins. Co.* 35 Fed. 15; *In re Pac. R. Comm.* 32 Fed. 241, 250; *Crocker-Wheeler Co. v. Bullock,* 134 Fed. 241; *Perry v. Rubber T. W. Co.* 138 Fed. 836. But the rule remains unshaken that production of books may be compelled where, as here, it is necessary and vital to the interests of the parties, and where they are relevant and the evidence sought cannot be obtained in any other way. See, also, *Bull v. Loveland,* 10 Pick. 9; *U. S. Exp. Co. v. Henderson,* 69 Iowa, 40, 28 N. W. 426; 3 Jones, Ev. § 802; Stats. 1898, sec. 4053; *Winder v. Diffenderffer,* 2 Bland (Md.) 166.

CASSODAY, C. J. This court took original jurisdiction in this case because it involved the validity of ch. 44, Laws of

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1903, and the same question was involved in another action pending before us on an order for re-argument, and so it was desirable that such question should be fully argued before determination. The decision in that case has made it unnecessary to say anything further about the validity of that act in this case. *Nunnemacher v. State, post,* p. 190, 108 N. W. 627. As indicated in the foregoing statement, the executors of Frederick Pabst, deceased, in obedience to the subpœna *duces tecum* served upon them, brought into the county court, and were ready to produce, "all the private books of account kept by" said deceased, "and all papers and certificates of stock and other documents bearing upon or relating to the stock of the *Pabst Brewing Company* owned by said" deceased, "and all books of account kept by the executors of the last will and testament of said deceased." But the relator did not obey the subpœna *duces tecum* so served upon its secretary and bring into court its "books of account, cash books, ledgers, stock books, and other books, papers, and documents," and its "trial balances made out and prepared" about January 1, 1903, and January 1, 1904, nor any of them, on the alleged ground that the county court had no authority or jurisdiction to compel such production.

The question, sharply presented, is whether the county court had such authority and jurisdiction. As indicated, the deceased was a large stockholder in the relator at the time of his death. The state contends that it became essential for the county court "to ascertain the fair market value" of such stock in order "to determine the inheritance tax" that the estate was required to pay, and the state concedes that "this is practically the only property in the state concerning which there is controversy as to the proper valuation." The relator concedes, in the language of the act, that "the tax so imposed" is to "be upon the clear market value of such property." Sec. 1, subd. 6. The relator also concedes that such value is to be determined either by the appraiser, appointed

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for that purpose under secs. 13 and 14 of the act, or by the county court, as prescribed by sec. 15 of the act. In case an appraiser is appointed, he is therein required to fix and appraise the property "at its fair market value, . . . and for that purpose the said appraiser is authorized to issue subpœnas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said county court, together with the depositions of the witnesses examined, and such other facts in relation thereto and to the said matter as the said county court may order or require." Sec. 14. And then, after requiring "the county court from such report *and other proofs* relating to any such estate" to "determine the cash value of such estate and the amount of tax to which the same is liable," the act provides as follows:

"Or the county court without appointing an appraiser, upon giving twenty days' notice . . . of the time and place of hearing, may at the time so fixed hear evidence and determine the cash value of such estate and the amount of tax to which the same is liable." Sec. 15.

Another section of the act declares:

"The county court . . . shall have jurisdiction to hear and determine all questions arising under the provisions of this act, and to do any act in relation thereto authorized by law to be done by a county court in other matters or proceedings coming within its jurisdiction." Sec. 12.

The language of the act seems to authorize the county court, with or without the appointment of an appraiser, to ascertain and determine such value of said estate, and for that purpose compel the attendance of witnesses and the taking of their testimony under oath. This seems to be conceded by the relator.

The mere fact that competent, material, and relevant testimony may be contained in the books of a third party or a corporation, and that it is inconvenient to produce them in court,

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is no excuse for disobeying a subpœna. *Wertheim v. Continental R. & T. Co.* 15 Fed. 716; *U. S. v. Babcock*, 3 Dill. 566, Fed. Cas. No. 14,484; *Johnson S. St. R. Co. v. North B. S. Co.* 48 Fed. 191, 195; *Amey v. Long*, 1 Camp. 14.

The relator contends that the county court had no power to compel the production of its private books and papers for inspection. The mere fact that the stock in question was issued by the relator did not make it a party to the controversy in respect to its value. That controversy was between the executors of the estate and the state of Wisconsin. Since the relator was not a party to that controversy, it is very obvious that the case presented does not come within the statutes requiring a party to produce books, papers, and documents, or copies thereof, or to give permission to take such copies. Secs. 4096, 4183 *et seq.*, Stats. 1898. Nor is there any claim that such books and papers of the relator contain any entries or admissions made by the deceased respecting such value of the stock in question or otherwise. Sec. 4189, Stats. 1898. See *State Bank v. Brown*, 165 N. Y. 216, 59 N. E. 1. True, the secretary of state alleges, upon information and belief, that there is "no other way of getting at the fair market value of said stock than by examining the books of said relator." But he fails to show how that way would be effectual; besides, such allegation was put in issue by the relator, and there is no proof nor showing of any facts in support of it. Whatever entries, statements, or memoranda may be contained in such books and papers must be regarded as having been put therein by the officers or agents of the relator and for its private use or benefit. The question recurs whether the relator is compellable to produce such private entries, statements, and memoranda for inspection in the controversy between the other parties mentioned.

In an English case, cited by counsel for the state, the court refused to compel the secretary and solicitor of a railway company to produce certain books and documents, because the di-

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rectors of the corporation were not parties to the controversy and refused to allow him to do so. *Crowther v. Appleby,* L. R. 9 C. P. Cas. 23. See *Doe d. Haden v. Burton,* 9 C. & P. 254. It has been held in New York:

"The books of a bank, not kept by either of the parties to an action, nor relating to transactions between them, but referring solely to transactions between the defendant and the bank, are not competent evidence, between the parties, to show the amount of paper which has been discounted by the bank for the defendant and the number of notes so discounted and renewed. And a statement made up from such books is equally incompetent." *Perrine v. Hotchkiss,* 58 Barb. 77.

To the same effect: *Isham v. Schafer,* 60 Barb. 317; *State Bank v. Brown,* 165 N. Y. 216, 59 N. E. 1, 53 L. R. A. 513. In the note to this last citation it is said:

"The general rule is that a person's books of account cannot be used as evidence upon issues between third persons; that entries in such books as to such third persons are *res inter alios acta* and cannot be used against persons not parties to them."

To the same effect: 2 Ency. of Ev. 667; *Kerns v. McKean,* 65 Cal. 411, 4 Pac. 404; *Treat v. Barber,* 7 Conn. 274; *Mercier v. Copelan,* 73 Ga. 636; *Powers v. H. & L. R. Co.* 33 Ohio St. 429; *Martin Brown Co. v. Perrill,* 77 Tex. 199, 13 S. W. 975; *Holt v. Pie,* 120 Pa. St. 425, 14 Atl. 389; *Minton v. Underwood L. Co.* 79 Wis. 646, 48 N. W. 857. So, in a case cited by counsel for the state it was held that:

"The court will not grant a motion to compel the opening of the records of a corporation not a party to the suit, but whose records, it is claimed, would disclose something of importance to the litigation." *Henry v. Travelers' Ins. Co.* 35 Fed. 15.

In the absence of circumstances not present here, such supposed entries and statements made in the books, papers, and documents of the relator by its officers or agents have no more probative force as evidence in court, in the controversy be-

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tween the executors and the state of *Wisconsin,* than oral declarations to the same effect, made by the same officers or agents, would have had. Such entries and statements were obviously mere hearsay made by third parties without the sanction of an oath. Such are the rules of evidence applicable in regular judicial proceedings.

Counsel for the relator claim that such rules should be applied with more stringency in a case where, as here, the county court was acting as an appraiser and engaged in securing witnesses and hearing evidence as to the value of the stock in question. In support of such contention counsel cite a case in New York, where, "under the provisions of the collateral inheritance act," it was held:

"In reference to fixing the value of property for the purpose of assessment and taxation, the surrogate is made the assessing and taxing officer and as such is the representative of the state." *Estate of Wolfe,* 137 N. Y. 205, 33 N. E. 156. See, also, *Estate of Ullmann,* 137 N. Y. 403, 407, 33 N. E. 480; *Amherst College v. Ritch,* 151 N. Y. 282, 343, 45 N. E. 876.

But in another case in that state, cited by the same counsel, it is said by the court:

"The statute does not confer jurisdiction upon the surrogate's court as such, in the first instance, to assess and determine the tax. The surrogate, as a taxing officer, after the appraiser has appraised the property, enters his order fixing the tax 'as of course,' and thereafter any person aggrieved may appeal therefrom *to the surrogate.* . . . It is clear that the initial steps which the statute requires the surrogates to take are those of taxing officers, and not of judges." *Weston v. Goodrich,* 86 Hun, 194, 199, 200, 33 N. Y. Supp. 382.

But, as indicated, our ch. 44, Laws of 1903, authorizes the county court, with or without the appointment of an appraiser, to ascertain and determine the value of the estate and to compel the attendance of witnesses and the taking of their testimony under oath. But there is nothing in the statutes authorizing the county court, whether acting as a judicial

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tribunal or as an appraiser, to compel a third party, under the facts and circumstances presented in this record, to produce his or its private books, papers, and documents for inspection, and certainly the county court has no such power in the absence of statutory authority.

Upon the case presented and the rules of procedure sanctioned by this court, the relator is entitled to a writ of prohibition. *State ex rel. Att'y Gen. v. Circuit Judge,* 97 Wis. 1, 15, 72 N. W. 193; *State ex rel. Rose v. Superior Court,* 105 Wis. 651, 81 N. W. 1046. No costs allowed, except the relator must pay the fees of the clerk of this court.

By the Court.—The peremptory writ of prohibition is hereby awarded as prayed by the relator.

NUNNEMACHER, Trustee, vs. THE STATE.

May 14—June 21, 1906.

Inheritance taxes: Constitutional law: Inherent rights as to property: Taxation not limited to property: Uniformity in rule of taxation: Equal rights and equal protection of the laws: Discrimination between different classes of relatives, etc.: Reasonable exemptions: Progressive rates: Levy of taxes by legislature: Fixing value of inheritance: Imposing nonjudicial duties on court.

1. The right to transmit property by descent or by will is an inherent right protected by the constitution and, though subject to reasonable regulation, cannot be wholly taken away or substantially impaired by the legislature.
2. Inheritance or succession taxes may be levied by the legislature in the exercise of the power of reasonable regulation and taxation of transfers of property.
3. Inheritance taxes are not taxes upon property, but upon the right to receive property.
4. Sec. 1, art. VIII, Const. (providing that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe"), does not by implied exclu-

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sion limit taxation to property taxation or prohibit the levying of excise taxes.

5. The rule, *expressio unius est exclusio alterius*, like all other mere rules of construction applied to ambiguous words, yields to proof of facts and circumstances which satisfactorily demonstrates that the meaning intended was different.

6. The proceedings of the constitutional convention, the decisions of this court, and the practical construction given to the taxing power of the government for more than fifty years concur to show that such power is not limited to property alone.

7. Taxation of railroads under ch. 74, Laws of 1854, and under the license system in use from 1860 to 1903, was not taxation of property within the meaning of sec. 1, art. VIII, Const., but was excise taxation upon the privilege of transacting business. So, also, the license fees exacted from other public service corporations whose property is exempted from taxation, and from domestic insurance companies, are privilege or occupation taxes.

8. The clause in sec. 1, art. VIII, Const., "the rule of taxation shall be uniform," if applicable to excise taxation at all, means no more than the general equality clauses of the state constitution or the guaranty of "the equal protection of the laws" in the XIVth amendment to the federal constitution. It means only that such taxation shall not unjustly discriminate, but shall operate alike upon all persons similarly situated.

9. Classification between lineal and collateral relatives and strangers, with different rates, and a reasonable exemption of small estates, as provided for in the inheritance tax law of 1903 (ch. 44), do not violate the rule of uniformity or the principle of the equal protection of the laws; nor does the progressive feature of the act, by which increased rates are imposed as the amount of the bequest or inheritance increases.

10. Sec. 5, art. VIII, Const. (which declares that "the legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year"), is intended merely as a regulation or provision covering the levy of a direct tax upon property, if such a tax be necessary, and does not apply to excise taxation.

11. That part of ch. 44, Laws of 1903, which provides that the county court, as an incident in the settlement of an estate, shall determine the value of the property inherited or bequeathed, as a

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basis for ascertaining the amount of the tax as fixed by the law, does not impose nonjudicial or merely administrative duties upon the court.

DODGE, J., dissenting, is of the opinion that the requirement of sec. 1, art. VIII, Const., that "the rule of taxation shall be uniform," is applicable to all taxation, whether on property as a subject or, by excise, on occupations, transfers, and the like, classification of the subjects of taxation being permitted, provided uniformity in the class is maintained; that amount or value of property or right is not a legitimate distinction germane to a classification of it for varying rates of a tax or excise based on value; and that, even if the uniformity clause has no application to taxation by excise, yet the general equality clauses of the constitution prohibit such discrimination between individuals as is involved in the progressive feature of the act of 1903, under which the rate varies according to the magnitude of the bequest or inheritance.

CASSODAY, C. J., dissenting, is of the opinion that the act of 1903 imposes a tax upon property within the meaning of sec. 1, art. VIII, Const., and that the classification provided for in the act, founded upon mere differences in value, is purely arbitrary and in violation of the constitutional guaranty of equal rights.

ACTION commenced in this court against the state. *Complaint dismissed.*

The cause was first argued on December 18, 1905.

For the plaintiff there was a brief by *Ryan, Ogden & Bottum,* attorneys, and separate briefs by *Charles Quarles* and by *Alfred L. Cary,* of counsel, and the cause was argued orally by *Mr. Quarles* and *Mr. L. M. Ogden.* They contended that ch. 44, Laws of 1903, is void as being in violation of sec. 1, art. VIII, Const., and argued at length the following propositions: (1) The right to take property by will, intestate laws, or gift is a natural right, guaranteed by the constitution, and not one either derived from or which can be taken away by the legislature. (2) The act in question imposes a tax, not upon property, but upon the right or privilege of taking property in the various methods prescribed in the act. *Estate of Wilmerding,* 117 Cal. 281; *Estate of Stanford,* 26 Cal. 12; *Kochersperger v. Drake,* 167 Ill. 122; *State v. Hamlin,* 86 Me. 495; *In re Inheritance Tax,* 23

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Colo. 492; *Union T. Co. v. Wayne Probate Judge,* 125 Mich. 487; *State ex rel. Fath v. Henderson,* 160 Mo. 190; *Gelsthorpe v. Furnell,* 20 Mont. 299; *Dixon v. Ricketts,* 26 Wash. 215, 72 Pac. 947; *State ex rel. Schwartz v. Ferris,* 53 Ohio St. 314, 41 N. E. 579; *Hagerty v. State ex rel.* 55 Ohio St. 613, 45 N. E. 1046; *Brown v. Elder,* 32 Colo. 527, 77 Pac. 853; *State ex rel. Sanderson v. Mann,* 76 Wis. 469; *Black v. State,* 113 Wis. 205, 222. (3) Sec. 1, art. VIII, Const., must be construed to limit the taxing power of the legislature to the imposition of taxes upon property only. The maxim *expressio unius est exclusio alterius* applies. *Milwaukee & M. R. Co. v. Waukesha Co.* 9 Wis. 399, 440 (argument of E. G. Ryan); *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 95; *State v. Gilman,* 33 W. Va. 146, 6 L. R. A. 847; *State ex rel. Morris v. Wrightson,* 56 N. J. Law, 126, 22 L. R. A. 548, 555; *People ex rel. Mooney v. Hutchinson,* 172 Ill. 486, 40 L. R. A. 770, 772; *Gougar v. Timberlake,* 148 Ind. 38, 37 L. R. A. 644, 650; *Ex parte Arnold,* 128 Mo. 256, 33 L. R. A. 386, 390; *Little Beaver Tp. Election: McCowin's App.* 165 Pa. St. 233, 27 L. R. A. 234, 235; *People v. Draper,* 15 N. Y. 532, 543, 544; *Spier v. Baker,* 120 Cal. 370, 41 L. R. A. 196, 199; *Parker v. Hughes,* 64 Kan. 216, 56 L. R. A. 275; Cooley, Const. Lim. (7th ed.) 99; *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 578. (4) Should the court be of the opinion that the legislature has the power to impose taxes upon rights or privileges other than property, the act in question is void for the reason that it violates the constitution, because it does not tax such rights by a uniform rule.

In the separate brief of *Mr. Quarles,* among other things, he considered more fully, as an historical question and otherwise, the doctrine that inheritance is a privilege; its justification; and the results which would flow from it.

Mr. Cary, in his separate brief, contended, *inter alia,* that, the main purpose of the act being to raise revenue for the state, its administration is of a legislative and not of a judi-

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cial character. So far, therefore, as the act places the administration in the hands of the county court it is void, for such courts have not jurisdiction to perform legislative acts. Under the constitution of the state their duties are wholly judicial and not legislative. Secs. 2, 14, art. VII, Const.; *Hardenburgh v. Kidd,* 10 Cal. 402; *Hutchinson v. Omaha,* 52 Neb. 345, 351; *Auditor v. A., T. & S. F. R. Co.* 6 Kan. 500, 507; *Fleming v. Trowsdale,* 85 Fed. 189; *Pennington v. Woolfolk,* 79 Ky. 13; *Ex parte Griffiths,* 118 Ind. 183, 20 N. E. 513.

The *Attorney General,* for the defendant, cited, as authorities sustaining the theory upon which inheritance taxes are based, viz.: (1) that an inheritance tax is not one on property, but on the right of succession thereto; and (2) that the right to take property by devise or descent is the creature of the law, and not a natural right: *Mager v. Grima,* 8 How. 490; *Society for Savings v. Coite,* 6 Wall. 594; *Plummer v. Coler,* 178 U. S. 115; *Magoun v. Ill. T. & S. Bank,* 170 U. S. 283; *Blackstone v. Miller,* 188 U. S. 189; *Estate of Wilmerding,* 117 Cal. 281; *Estate of Stanford,* 126 Cal. 112; *In re Inheritance Tax,* 23 Colo. 492; *State v. Dalrymple,* 70 Md. 294; *Minot v. Winthrop,* 162 Mass. 113; *State ex rel. Fath v. Henderson,* 160 Mo. 190; *Gelsthorpe v. Furnell,* 20 Mont. 299; *Estate of Hoffman,* 143 N. Y. 327; *Estate of Van Kleeck,* 121 N. Y. 701; *Estate of Swift,* 137 N. Y. 83; *Estate of Dows,* 167 N. Y. 227; *Estate of Delano,* 176 N. Y. 486; *Pullen v. Comm'rs,* 66 N. C. 361; *State ex rel. Schwartz v. Ferris,* 53 Ohio St. 314; *Strode v. Comm.* 52 Pa. St. 181; *Orcutt's App.* 97 Pa. St. 179; *Estate of Bittinger,* 129 Pa. St. 338; *State v. Alston,* 94 Tenn. 674; *Eyre v. Jacob,* 14 Grat. 422; *Schoolfield's Ex'r v. Lynchburg,* 78 Va. 366; *Billings v. People,* 189 Ill. 472; *Kochersperger v. Drake,* 167 Ill. 122; *State v. Clark,* 30 Wash. 439; *Dixon v. Ricketts,* 26 Utah, 215, 72 Pac. 947. He also discussed fully the other contentions made on behalf of the plaintiff.

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On January 30, 1906, a re-argument was ordered upon the following questions:

1. Is the tax imposed by ch. 44, Laws of 1903, a tax upon "property" within the meaning of the constitution?

2. Assuming that it is controlled by the constitutional requirement, "The rule of taxation shall be uniform," is that requirement breached either, *first,* by the imposition of rates of taxation varying with the degrees of propinquity between the decedent and the beneficiaries; or, *secondly,* by the imposition of progressive rates, varying according to the amounts of the legacies or inheritances received?

The cause was re-argued on May 14, 1906.

For the plaintiffs there were briefs by *Ryan, Ogden & Bottum,* attorneys, and separate briefs by *Charles Quarles* and by *Alfred L. Cary,* of counsel, and the cause was argued orally by *Mr. Quarles, Mr. L. M. Ogden,* and *Mr. E. C. Bastman.*

R. M. Bashford, special counsel, and the *Attorney General,* for the defendant.

WINSLOW, J. This is an action commenced in this court under the provisions of sec. 3200, Stats. 1898, to recover from the state the amount of an inheritance tax paid under protest pursuant to an order of the county court of Waukesha county. The complaint is based upon the ground that ch. 44, Laws of 1903, under which the tax was levied and paid, is unconstitutional. The attorney general interposed a general demurrer to the complaint, and thus the question of the constitutionality of the law is squarely presented.

A previous law attempting to tax inheritances and bequests (ch. 355, Laws of 1899) was before this court in the case of *Black v. State,* 113 Wis. 205, 89 N. W. 522, and was there held unconstitutional for the reason that it provided for unlawful discrimination, in that a beneficiary receiving a legacy or inheritance from an estate under $10,000 paid no tax,

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while a beneficiary standing in exactly the same relation to the decedent and receiving a legacy or inheritance of the same amount from an estate exceeding $10,000 was obliged to pay a tax. In that case it was not contended that an inheritance or succession tax could not lawfully be levied in this state. In fact, the validity of such legislation, as a general proposition, was conceded; but the contention was that the law in question made unlawful discriminations and hence was void. From this concession it resulted that this court assumed, rather than decided, in that case that an inheritance tax law making no unlawful discrimination between heirs or beneficiaries could be passed in this state which would be constitutional. It was doubtless in response to the suggestions of the opinion in that case that ch. 44, Laws of 1903, which is now attacked, was passed.

Sec. 1 of the last-named law provides in substance that a tax shall be imposed upon any transfer of property or interest in property, real, personal, or mixed, to any person, association, or corporation (except corporations organized solely for religious, charitable, or educational purposes), when made by will or by operation of the intestate laws, or by transfer made by the grantor or by another person under a power of appointment in contemplation of death, to take effect at or after the death of the grantor, which tax shall be based upon the clear market value of such property at the rates thereinafter prescribed, and only upon the excess over the exemptions thereinafter granted.

Sec. 2 provides that when the property or interest transferred exceeds the exemption and does not exceed $25,000 the tax shall be (1) one per cent. of the clear value where the person entitled to such property shall be the husband, wife, lineal issue, lineal ancestor of the decedent, or lawfully adopted or mutually recognized child of the decedent, or a descendant of such child; (2) one and one-half per cent. in case of the brother or sister of the decedent, or a descendant of such brother or sister, or the wife or widow of a son, or the

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husband of a daughter, of the decedent; (3) three per cent. in case of the brother or sister of the father or mother of the decedent, or a descendant of such brother or sister; (4) four per cent. in case of the brother or sister of the grandfather or grandmother of the decedent, or a descendant of such brother or sister; (5) five per cent. in case of a beneficiary in any other degree of collateral consanguinity, or a stranger in blood, or a body politic or corporate. These rates are termed the primary rates.

Sec. 3 provides that when the value of the property exceeds $25,000 the rates of tax upon the excess shall be as follows: (1) Upon the excess over $25,000 up to $50,000, one and one-half times the primary rates; (2) from $50,000 to $100,000, two times; (3) from $100,000 to $500,000, two and one-half times; (4) upon all in excess of $500,000, three times the primary rates.

Sec. 4 provides for exemptions as follows: (1) All property transferred to domestic corporations organized solely for religious, charitable, or educational purposes and used exclusively for such purposes; (2) property of the value of $10,000 transferred to the widow, and property of the value of $2,000 transferred to each of the other persons named in the first division of sec. 2; (3) property of the value of $500 transferred to each of the persons named in the second division of sec. 2; (4) property of the value of $250 transferred to each of the persons named in the third division of sec. 2; (5) property of the value of $150 transferred to each of the persons named in the fourth division of sec. 2; and (6) property of the value of $100 transferred to each of the persons or corporations named in the fifth division of sec. 2.

The remaining sections contain full provisions for the administration of the law and the collection of the tax, which are not necessary to be stated here.

The constitutionality of this law, and of any similar law, is now attacked upon the following general grounds:

First: That the right to take property by inheritance or by

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will is a natural right protected by the constitution, which cannot be wholly taken away or substantially impaired by the legislature.

Second: That the constitution of this state limits the power of taxation to property only, and that this tax is an excise levied upon a right or privilege, and hence unconstitutional.

Third: That even if the legislature has power, under the constitution, to levy such a tax, this law violates the constitutional requirement that the rule of taxation shall be uniform.

I. With the first of these propositions we agree. We are fully aware that the contrary proposition has been stated by the great majority of the courts of this country, including the supreme court of the United States. The unanimity with which it is stated is perhaps only equaled by the paucity of reasoning by which it is supported. In its simplest form it is thus stated: "The right to take property by devise or descent is the creature of the law and not a natural right." *Magoun v. Ill. T. & S. Bank,* 170 U. S. 283, 18 Sup. Ct. 594. In *Eyre v. Jacob,* 14 Grat. 422, it is stated more sweepingly thus:

"It [the legislature] may tomorrow, if it pleases, absolutely repeal the statute of wills, and that of descents and distributions, and declare that, upon the death of a party, his property shall be applied to the payment of his debts and the residue appropriated to public uses."

But it has been reserved for the supreme court of North Carolina to sweep away all natural property rights in a few terse sentences, which may well be quoted:

"Property itself, as well as the succession to it, is the creature of positive law. The legislature declares what objects in nature may be held as property; it provides by what forms and on what conditions it may be transmitted from one person to another; it confines the right of inheriting to certain persons whom it defines heirs; and on the failure of such it takes the property to the state as an escheat. The right to

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give or take property is not one of those natural and inalienable rights which are supposed to precede all government and which no government can rightfully impair." *Pullen v. Comm'rs,* 66 N. C. 361.

In this declaration the court of North Carolina seems to have easily reached the logical goal toward which the other cases only tend, namely, the denial of all natural rights of property. It comes perilously near the doctrine that might makes right,

> "The simple plan
> That they should take who have the power,
> And they should keep who can."

The fallacy of the idea that the government creates or withholds property rights at will is very apparent. Under our system the government is the creature of the people, the product of a social compact. The people, in full possession of liberty and property, come together and create a government to protect themselves, their liberty, and their property. The government which they create becomes their agent; the officers their servants. Under the theory of the North Carolina court these agents, in turn, create property rights and confer them upon their creators, who possessed these rights long before. The people create an agency to protect their existing rights which assumes to confer or withhold these same rights.

But the question is chiefly historical. From the historical standpoint the idea that all rights of property and rights to transmit the same by inheritance or will have their origin in the positive enactments of law by an established government cannot stand the test. Governments have, indeed, from the earliest times, regulated the exercise of these rights, prescribed ways and forms for their exercise, and protected them by positive law; and so they do now. From this universal exercise of the right of regulation the idea of governmental right to create and destroy may have arisen, but it seems more likely to have arisen from failure to keep in mind the radical difference between our republican theory of the origin of gov-

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ernment and the European medieval theory. Our theory is that the people, in full possession of inalienable rights, form the government to protect those rights. The medieval idea was that the government was sent down from above, and that from it rights and privileges were allowed to flow in gracious streams to the people, who otherwise would not possess them.

That there are inherent rights existing in the people prior to the making of any of our constitutions is a fact recognized and declared by the Declaration of Independence, and by substantially every state constitution. Our own constitution says in its very first article:

"All men are born equally free and independent and have certain inherent rights; among these are life, liberty, and the pursuit of happiness; *to secure* these rights governments are instituted among men, deriving their just powers from the consent of the governed."

Notice the language, "to secure these [inherent] rights governments are instituted;" not to manufacture new rights or to confer them on its citizens, but to conserve and secure to its citizens the exercise of pre-existing rights. It is true that the inherent rights here referred to are not defined but are included under the very general terms of "life, liberty, and the pursuit of happiness." It is relatively easy to define "life and liberty," but it is apparent that the term "pursuit of happiness" is a very comprehensive expression which covers a broad field. Unquestionably this expression covers the idea of the acquisition of private property; not that the possession of property is the supreme good, but that there is planted in the breast of every person the desire to possess something useful or something pleasing which will serve to render life enjoyable, which shall be his very own, and which he may dispose of as he chooses, or leave to his children or his dependents at his decease. To deny that there is such universal desire, or to deny that the fulfilment of this desire contributes in a large degree to the attainment of human happi-

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ness, is to deny a fact as patent as the shining of the sun at noonday. And so we find that, however far we penetrate into the history of the remote past, this idea of the acquisition and undisturbed possession of private property has been the controlling idea of the race, the supposed goal of earthly happiness. From this idea has sprung every industry, to preserve it governments have been formed, and its development has been coincident with the development of civilization. And so we also find that from the very earliest times men have been acquiring property, protecting it by their own strong arm if necessary, and leaving it for the enjoyment of their descendants; and we find also that the right of the descendants, or some of them, to succeed to the ownership has been recognized from the dawn of human history. The birthright of the firstborn existed long before Esau sold his right to the wily Jacob, and the Mosaic law fairly bristles with provisions recognizing the right of inheritance as then long existing, and regulating its details. The most ancient known codes recognize it as a right already existing, and Justice BROWN was clearly right when he said, in *U. S. v. Perkins,* 163 U. S. 625, 16 Sup. Ct. 1073:

"The general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit the property of their parents."

The existence of the right to dispose of property by will in the earliest times is not so easy of proof. Nevertheless it seems there can be no doubt of the fact. The biblical writings show the exercise of the right from the times of Abraham, and Mr. Schouler in his work on Wills (2d ed.) § 13, says that history "confirms the opinion that the practice of allowing the owner of property to direct its destination after his death, or at least of imposing general rules of inheritance, is coeval with civilization itself, and so close, in fact, upon the origin of property and property rights as not to be essentially separated in point of antiquity." The laws of Solon allowed

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the willing of personal property in Athens, and the laws of the Twelve Tables in Rome. In England the right of testamentary disposition of personal and real property, or at least a part of it, was recognized from the very earliest times, but lands could not be willed after the Norman invasion and the establishment of feudal tenures until Stat. 32 Henry VIII, ch. 1, §§ 1–5. Cassoday, Wills, § 31 *et seq.;* 30 Am. & Eng. Ency. of Law (2d ed.) 549.

So clear does it seem to us from the historical point of view that the right to take property by inheritance or will has existed in some form among civilized nations from the time when the memory of man runneth not to the contrary, and so conclusive seems the argument that these rights are a part of the inherent rights which governments, under our conception, are established to conserve, that we feel entirely justified in rejecting the *dictum* so frequently asserted by such a vast array of courts that these rights are purely statutory and may be wholly taken away by the legislature.

It is true that these rights are subject to reasonable regulation by the legislature; lines of descent may be prescribed, the persons who can take as heirs or devisees may be limited, collateral relatives may doubtless be included or cut off, the manner of the execution of wills may be prescribed, and there may be much room for legislative action in determining how much property shall be exempted entirely from the power to will, so that dependents may not be entirely cut off. These are all matters within the field of regulation. The fact that these powers exist and have been universally exercised affords no ground for claiming that the legislature may abolish both inheritances and wills, turn every fee-simple title into a mere estate for life, and thus, in effect, confiscate the property of the people once every generation.

But, while we utterly reject the doctrine of *Eyre v. Jacob,* 14 Grat. 422, and hold that the right to demand that property pass by inheritance or will is an inherent right subject

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only to reasonable regulation by the legislature, we are not thereby brought to the conclusion that inheritance or succession taxes cannot be levied. They do not depend upon the right to confiscate. We agree entirely with the ideas expressed by the supreme court of Massachusetts in *Minot v. Winthrop,* 162 Mass. 113, 38 N. E. 512, where it is said:

"We assume that under the constitution this (*i. e.* the taking of all property by the state on the death of the owner) cannot be done either directly or indirectly; that the legislature cannot so far restrict the right to transmit property by will or by descent as to amount to an appropriation of property generally; that it cannot impose a tax which shall be equivalent or almost equivalent to the value of the property, and cannot so limit the persons who can take as heirs, devisees, distributees, or legatees that the great mass of all the property of the inhabitants must become vested in the commonwealth by escheat. The state can take property by taxation only for the public service, and we assume that its right to take property, if any exists, by regulating the distribution of it on the death of the owner is limited in the same manner, and that this right must be exercised in a reasonable way."

Inheritance or succession taxes are very ancient and are said to have had their origin in the Roman law. They have long been in force in the European states, and in England and her colonies, where they are known as "death duties." They may be fully justified under the power of regulation and taxation of transfers of property. No one doubts for a moment that a government may levy a tax upon transfers of land or upon business transactions; it is done by the federal government in this country whenever additional and extraordinary revenues are needed, in the form of stamp duties. These taxes are not based upon the power to interdict or prohibit such transactions, but upon the power to reasonably regulate and tax them. Succession or inheritance taxes may well be sustained upon the same principle; not upon the power to prohibit, but upon the power to reasonably regulate and tax. This power existed when our state government was formed.

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It entered into and modified the inherent right to possess, transmit, and will property, at the time the constitution was adopted, so that the inherent right recognized and preserved by the constitution was and is a right subject to reasonable regulation and taxation.

So we arrive at the conclusion that the general principle of inheritance taxation may be justified under the power of reasonable regulation and taxation of transfers of property, and we pass to the second contention.

II. This contention is that by sec. 1 of art. VIII of the constitution taxes can only be levied on property. This provision is the only general provision of the constitution upon the subject and reads as follows: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." The argument is that this provision, by the rule of *expressio unius est exclusio alterius,* prohibits the levy of any taxes in this state except taxes upon property, and that as inheritance taxes are held to be excise taxes upon the right to take property and not taxes upon property they cannot be levied in this state. It must be admitted that, by the absolutely uniform current of decision in this country, inheritance taxes are not taxes upon property, but upon the right to receive property. It would not be useful to cite the cases which hold this doctrine; they will be found quite fully cited and tabulated in 27 Am. & Eng. Ency. of Law (2d ed.) 338, note 5. This court has announced the same doctrine in *State ex rel. Sanderson v. Mann,* 76 Wis. 469, 45 N. W. 526, 46 N. W. 51, and *Black v. State,* 113 Wis. 205, 89 N. W. 522, and it cannot be considered as open to doubt. So we meet the question whether any taxes other than taxes upon property can be constitutionally levied in Wisconsin. It seems strange that, notwithstanding the lapse of nearly three score years since the adoption of the constitution, this question has never been authoritatively decided in Wisconsin, yet such is the undoubted fact. The

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clause has been considered and the question approached in numerous cases. Laws imposing license taxes upon hawkers and peddlers, upon the keeping of dogs, the sale of liquors, and upon insurance agents and insurance companies have been sustained under the police power. *Morrill v. State,* 38 Wis. 428; *Tenney v. Lenz,* 16 Wis. 566; *State ex rel. Henshall v. Ludington,* 33 Wis. 107; *Fire Department v. Helfenstein,* 16 Wis. 136; *Travelers' Ins. Co. v. Fricke,* 99 Wis. 367, 74 N. W. 372, 78 N. W. 407. Poll taxes for highway repair purposes have been uniformly levied and never questioned, but these also may perhaps be sustained under the police power. 1 Cooley, Taxation (3d ed.) 16. Railroad license taxation has been sustained upon grounds more fully considered later. In the course of the discussion upon this latter form of taxation in *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833, it was said on page 95 (8 N. W. 855): "Accordingly taxes can only be levied upon such property as the legislature shall prescribe, and then only by a uniform rule;" but the question at issue in that case was simply a question of exemption of property from taxation, and the sentence quoted unquestionably referred to property taxation and was not intended to lay down the principle that property taxation was the only taxation possible under the constitution. In *Black v. State,* 113 Wis. 205, 89 N. W. 522, as we have seen, it was assumed by reason of the admission of counsel that inheritance taxes might legally be levied in this state, and hence the statement in *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468, that the question whether taxes other than taxes upon property are forbidden by our constitution was one not then authoritatively decided is strictly correct. The most that can be said is that there are intimations in both directions, and that the intimations that taxation upon anything except property is forbidden are the more numerous.

In approaching the question we start with the familiar proposition that the legislature has all the usual and neces-

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sary governmental powers, including the power to levy taxes upon occupations, privileges, franchises, and the like, as well as upon property, unless such power has been taken away by the constitution. There are no express words in the constitution limiting taxation to property taxation, but the question is whether sec. 1 of art. VIII, above quoted, has the effect of such a limitation under the familiar rule of construction, *expressio unius est exclusio alterius.* If we were compelled to decide this question upon the bare words themselves, without the help of the debates occurring in the constitutional convention when this section was formulated, and without the help of subsequent practical construction, the argument would be strong in favor of the plaintiff's contention. But we have a brief record of the constitutional debates, and we have fifty years of practical construction since the adoption of the constitution, and both must be considered.

Turning to the printed journal of the second constitutional convention, we find on page 113 that the committee on general provisions, of which Byron Kilbourn was chairman, on December 30, 1847, reported to the convention the article on "Finance," of which the first two sections were as follows:

"(1) All taxes levied in this state shall be as nearly equal as may be.

"(2) The property of the state and counties, both real and personal, and such property as the legislature shall deem proper, belonging to educational, charitable, or religious institutions, or set apart for such purposes, shall be exempted from taxation."

This article was taken up and considered in committee of the whole at the afternoon session on January 4, 1848, and Mr. Whiton moved to amend by striking out the whole of sec. 2, and made some remarks in support of the motion. (It appears by the preface that Mr. Whiton requested that his remarks be not reported, so we unfortunately are deprived of the aid which might well be expected from the remarks of

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that eminent lawyer and statesman, who was afterwards chief justice of this court.) The journal then proceeds as follows (p. 195):

"Mr. Kilbourn said this subject had been elaborately discussed in the committee, and they had arrived at the conclusion expressed in the article. The attention of the committee had been called to the subject by one of its members, and the question raised whether it was necessary to declare that the property of the state should not be taxed. It was evident that the state could derive no advantage from taxing its own property; but the counties might derive a revenue by taxing the property of the state. For instance, the county of Dane might levy a tax upon the capitol, if no such prohibition as was contained in this section existed. The first section provided that all taxes within the state should be as nearly equal as may be. This provision would require that all the property in the state should be taxed equally, not the property of A., B., and C. merely, but all the property in the state, which would include the property of the state, and without the restriction in the second section it was supposed that the legislature could not restrict the counties from taxing it.

"Mr. Whiton modified his motion so as to amend the section by exempting the property of counties; which amendment prevailed.

"Mr. Rountree offered an amendment as a new section providing that all taxes should be by assessment of the value of the property taxed, excepting pedlars, hawkers, ferries, etc., and giving the legislature power to tax those separately.

"Mr. Kilbourn would like to hear some reasons from the gentleman from Grant, in favor of the section he had proposed. It seemed to him very much like entering into the details of legislation. If they were to specify the kinds of property to be taxed and the precise mode of taxation, they should begin with real estate and go through with an enumeration of every species of property to be taxed and the mode of taxing it. He thought the first section was sufficient upon that subject. It was simple and concise, and covered the whole ground.

"Mr. Rountree thought the first section did not cover the whole ground. He wished to have the legislature bound by

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some rules which would secure equal taxation, some rules which would require that taxation should be based upon some fair valuation of the property taxed, and not left to tax property coming under the same general denomination equally, while the value might be very different. He considered it a matter of very great importance. Our present laws did not secure a just and equitable valuation of property as the rule of taxation, and it was this kind of partiality and favoritism extended to particular kinds of property which he wished to see prohibited by the constitution. If gentlemen expected to get a good constitution without having anything in it, they would find themselves mistaken in the end. He wanted a constitution which common people could understand, and not one which no one could understand without going to a lawyer, or to those who made it a business to tell them what it meant.

"Mr. Chase could not see for his life what force or effect the section would have if placed in the constitution, for the legislature would have the same power without it as with it. He agreed with the gentleman from Grant that the value of the property should be the basis of taxation, but it seemed to him that the gentleman was going against his own principle in providing for the taxation of pedlars, hawkers, and jugglers, for he could not understand what kind of property they were. He thought they could not be regarded as things of much value, and for his own part he considered them rather as nuisances than otherwise.

"Mr. Doran moved to amend section second so as to exempt from taxation the property of towns, cities, and the wards of cities.

"Mr. Lovell suggested to the gentleman from Milwaukee a modification of his amendment so as to exempt generally the property of municipal corporations.

"Mr. Doran declined so to modify his motion. The terms 'municipal corporations' applied only to corporations possessed of legislative powers, and did not cover the ground which he wished to cover. He wished the exemption to apply to bodies corporate, which were not always municipal corporations. The several wards in the city of Milwaukee possessed separate property which he thought should be exempted from taxation, and yet they were not, in themselves, municipal corporations.

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"Mr. Chase would inquire for what purposes those wards held their separate property. If held for educational purposes, it was already exempted by the section with all other property held for the same purpose. If it were held for charitable purposes, it was already exempted with all other property held for the same purpose. If it were held for any purpose for which it ought to be exempted, it was already exempted by the general provisions for that purpose, and if it were held for purposes of speculation it ought to be taxed.

"Mr. Kilbourn explained that the several wards own fire engines and engine houses, public grounds, markets, and market houses, which, although not devoted to either charitable or educational purposes, were public property, and should be exempt from taxation.

"The amendment was adopted.

"Mr. Whiton moved to amend the first section by adding the words 'and shall be levied upon such property as the legislature shall prescribe.'

"Mr. Chase said the amendment proposed by the gentleman from Rock would improve the section, but it would improve it still more if he would include in his amendment a proposition to strike out the words 'may be,' in the first line, and insert the word 'practicable,' so that it would read 'all taxes in this state shall be as nearly equal as *practicable.*' The words 'may be' covered all sorts of amendments, and, as they stood in the section, they had no meaning at all. The section might as well have read, 'All taxes in this state *may be* as nearly equal as they *shall be.*' They *shall be* as they *may be,* or they *may be* as they *shall be,* and this was all the sense there was attached to the words.

"Mr. Whiton's amendment was adopted, when

"Mr. Chase moved the amendment of which he had just spoken, and it was adopted.

. . . . . .

"Mr. Cotton moved to strike out the second section.

"Mr. Judd would like to have some reason for striking out the section after all the trouble they had had in amending it. He read the several provisions it contained and commented briefly on the importance of each. He approved of every one of its provisions, and hoped it would not be stricken out.

"Mr. Kilbourn thought the section could do no harm and

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might do some good. It recognized the principle which the legislature should adhere to in exempting property from taxation. If stricken out, the very history of that fact might be construed as discountenancing the principle.

"Mr. Lovell hoped the section would be stricken out for the reason that it did no good, for he believed that, in an instrument of this nature, whatever did no good must necessarily do harm. If it did no other harm, it would embarrass the discretion conferred upon the legislature by the first section as amended.

"The motion to strike out was agreed to.

"Mr. Whiton moved to strike out the first line of the first section to the word 'practicable,' inclusive, and insert

" 'The rule of taxation shall be uniform throughout this state.'

"Which was adopted.

"Mr. Doran moved to insert a section as section second, providing that the property of the state, and of counties, towns, cities, and wards of cities, and all property held for educational or charitable purposes, should be exempt from taxation.

"Mr. Chase thought this the same section in substance as the one stricken out.

"Mr. Doran said the gentleman from Fond du Lac was mistaken. The section stricken out allowed the legislature a discretionary power, while the section he had proposed was imperative in respect to property devoted to educational or charitable purposes.

"Mr. Chase was still more convinced of the impropriety of adopting this section. Who was to determine what was a charitable purpose and what was not? He might regard some objects as charitable objects, in respect to which but very few members of the convention would agree with him. Again, if they attempted to specify in the constitution what kinds of property should be exempt from taxation, they should make the specification complete and enumerate every kind of property which should be exempt.

"Mr. Lovell wished to state an objection to the proposed section which he did not recollect to have heard alluded to in the course of the debate. Such were the established rules of construction with reference to constitutional provisions, that,

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if the constitution made certain exemptions, it would operate as a prohibition upon the legislature to make any other or further exemptions. If, therefore, the proposed section should be adopted, it would make an end of all legislation on that subject. The legislature would have no power to exempt any other property from taxation, whatever might be the necessity for and propriety of such exemption.

"The amendment was rejected, and the article laid aside to be reported. . . ."

It is somewhat singular that the amendment or new section offered by Mr. Rountree in place of sec. 2 was not inserted in full in the journal. It appears in full in the account of the proceedings published in the Wisconsin Democrat of January 5, 1848, doubtless prepared by one of the same reporters, and is as follows:

"Sec. 2. The legislature shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property, such value to be ascertained by some person or persons to be selected in such manner as the legislature shall provide by law, but the legislature shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, toll bridges and ferries, and persons using and exercising franchises and privileges, in such manner as they shall from time to time prescribe by law."

It further appears from the journal, on page 202, that the report of the committee of the whole upon the article on Finance was taken up by the convention on January 5th, and the following proceedings were had:

"No. 10. Article on 'Finance;'

"Was then taken up,

"And, the question being on concurring in the first amendment of the committee of the whole, which was, 'strike out the first section,' and in lieu thereof as follows:

" 'The rule of taxation shall be uniform throughout this state, and taxes shall be levied upon such property as the legislature shall prescribe.'

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"Mr. Judd moved to amend the amendment by inserting the following as sections 1 and 2:

" 'Sec. 1. All taxes levied in this state shall be uniform and equal; and shall be assessed upon a just valuation of real and personal property.

" 'Sec. 2. The property of the state, property of any common school, university, college, or seminary of learning, all houses erected for and dedicated to the public worship of God, and the lots which they necessarily occupy for such purpose, and all public burying grounds and such other property as the legislature shall prescribe by law, shall be free from taxation.'

"And the question being put upon the adoption of the same,

"It was decided in the negative.

"The first amendment of the committee was then concurred in."

Upon page 205 of the journal it appears that Mr. Judd again moved to amend the article by inserting the following as sec. 2:

"The property of the state, property of any common school, university, college, or seminary of learning, all houses erected for and dedicated to the public worship of God, and the lots which they necessarily occupy for such purpose, and such other property as the legislature shall prescribe by law, shall be free from taxation."

This motion was followed by a debate upon the advisability of naming specific exemptions, participated in by Messrs. Chase, Lovell, Richardson, Kilbourn, Whiton, and Judd, and the motion was rejected by a vote of 42 to 17.

It appears, by the newspaper report contained in the newspaper before mentioned, that Mr. Richardson also proposed to amend by striking out the section reported by the committee and inserting the following:

"Sec. 1. All taxes to be levied in this state shall be levied upon all property, both real and personal, according to valuation.

"Sec. 2. Property belonging to the state, educational, charitable or religious institutions, or set apart for such purposes,

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and such other property as the legislature shall deem proper, shall be exempted from taxation, anything contained in the first section of this article to the contrary notwithstanding."

But the amendment was rejected.

It further appears from the newspaper report that Mr. Vanderpool proposed the following as sec. 2:

"The legislature shall determine by law what property shall be exempt from taxation, and all other property, both real and personal, shall be taxed according to its valuation."

But the amendment was ruled out of order. Neither of these last two proposed amendments is mentioned in the journal. The article was then ordered to be engrossed.

It further appears by the journal, on pages 465 and 466, that the committee on revision and arrangement recommended to strike from sec. 1 the words "throughout the state," which was agreed to, and the section was finally incorporated in the constitution as it now stands, viz., "The rule of taxation shall be uniform, and taxes shall be levied on such property as the legislature shall prescribe."

Examination of this brief record brings out several rather remarkable facts: First, the debate in the committee of the whole upon this very important clause of the constitution, and as a result of which its terms were settled, occupied only a part of a single half-day's session; second, that debate, as well as the short debate which occurred on the following day on the floor of the convention upon Mr. Judd's amendment, was devoted wholly to the question of the exemption of property from taxation and the relative advisability of specifying in the constitution what property should be exempt, or of leaving the whole subject to the legislature in a general phrase; third, Mr. Rountree's amendment providing specially for the taxation of occupations and franchises was rejected, not for the reason that it was desired to deny the legislature power to levy such taxes, but because, as expressed by Mr. Kilbourn, it was going into the details of legislation, and, as

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expressed by Mr. Chase, the legislature would have the same power without it as with it, and to these views there was no dissent; fourth, if by this clause the legislature intended to limit taxation to property alone they did so without debate and apparently without a word upon the subject either *pro* or *con*.

There were eminent lawyers in that convention. Mr. Lovell and Mr. Whiton were the peers of any in the territory at that time, even if we could name no others. They knew, and undoubtedly many others knew, that excise taxation was a valuable and widely used form of the taxing power; yet if we adopt the view contended for by the plaintiff we must say that they deliberately deprived the state of this most effective and useful arm of the taxing power after a debate of an hour or two devoted solely to the subject of exemptions from property taxation. This conclusion is startling, to say the least. It can only be reached by arbitrary application of the rule of *expressio unius,* and this rule, like all other mere rules of construction applied to ambiguous words, yields to proof of surrounding facts and circumstances which satisfactorily demonstrates that the meaning intended by the parties was different.

But we are not dependent upon the proceedings of the convention alone in our effort to properly interpret this clause. History has been made since then. Practical construction has been given to the taxing power of the government for more than half a century. Has the state confined itself to property taxation, or has it levied excise taxes in addition? This question brings us to the consideration of the true nature of the railroad license taxation system, which was in use in this state from 1860 to 1903, a history of which will be found in the opinion in the case of *State v. Railway Cos.* 128 Wis. 449, 108 N. W. 594. The first attempt to tax railroads was made by ch. 74, Laws of 1854, which provided for the payment by railroads of one per cent. of their gross earnings

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for the previous year in lieu of all taxes, and authorized a levy upon the property and franchises of the company and sale of the same in default of payment. The constitutionality of this act was attacked in the case of *Milwaukee & M. R. Co. v. Waukesha Co.* 9 Wis. 431, 449, in the year 1855. Judge HUBBELL, upon the circuit bench, upheld the law on the ground that the same provided, not for a tax, but for the payment of a bonus or compensation by the company for the exemption of its property from taxation. The case came to this court and was ably argued by E. G. Ryan for the appellants and Finch & Lynde for the respondent. The law was sustained, but unfortunately no formal opinion was written, and the case was not officially reported for some years. In 1859 the case of *Knowlton v. Rock Co.* 9 Wis. 410, came before this court, involving the question of the validity of a law requiring farming lands within the limits of a city to be taxed at a different rate from property within recorded plats, and it was held that property could not be so classified. Reference was made in the opinion to the case of *Milwaukee & M. R. Co. v. Waukesha Co., supra,* and the statement made that it was there determined that no question of the exercise of the taxing power was involved in it. At this time Judge DIXON was chief justice and Judges COLE and PAINE were associate justices, while in 1855 the bench was composed of Justices WHITON, SMITH, and COLE. Judge SMITH, however, was still the official reporter in 1859, and in reporting the *Knowlton Case, supra,* he inserted as a note a full report of the *Milwaukee & M. R. Co. Case,* with his memorandum of the decision in that case, which it appears was prepared at the time the case was decided with the idea that a formal opinion should be written later, which for some reason was never done. This report of the case appears at page 431 of the original edition of 9 Wis. (Vilas & Bryant ed. 399), and the memorandum appears on page 449 of the original edition. From this memorandum we learn (1) that it was

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held that the act did not violate the clause requiring uniform taxation providing all railroad property is alike taxed or alike exempt; (2) that the court thought the law did not impose a tax *within the meaning of the constitutional provisions,* and hence was valid.

At the January term, 1860, however, the direct question again came up whether the railroad taxation law of 1854 was constitutional, in the case of *State ex rel. Att'y Gen. v. Winnebago L. & F. R. P. R. Co.* 11 Wis. 35, and it was held (Justice COLE dissenting) that it provided for a tax on property, and transgressed the rule of uniformity, and hence was unconstitutional. In this case reference was again made to the *Milwaukee & M. R. Co. Case,* "in which there was never any opinion written," and it was distinctly overruled against Judge COLE's protest. In this case the opinion takes up and treats the claim that the exaction is a license fee and not a tax, and rejects it for various reasons, among which were that it was directly called a tax in the title of the act, that it provided for no license, that it did not pretend to grant any authority or privilege to do any act, and hence did not perform the functions of a license law. This decision was made at the January term, 1860, and evidently threw the financial systems of the state and municipalities into great disorder. The legislature at once passed chs. 173 and 174, Laws of 1860; the first-named chapter exempting all railroad property from taxation, and the last-named chapter providing for taxation of railroads by the license system. In these acts the attempt of the legislature to follow the suggestions of the court in the *Plank Road Case* (11 Wis. 35) and make a law which should, in fact, be a license law is very manifest. Every reason suggested in that case why the law of 1854 could not be considered a license law was observed, and an attempt made to obviate it. But the question would not down. It was presented again in *Kneeland v. Milwaukee,* 15 Wis. 454, in 1862, when the extent of the financial ruin and govern-

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mental paralysis resulting from the holding in the *Plank Road Case* was evident on every hand. The court in this case, after affirming the *Plank Road Case* upon the first argument, entertained a motion for rehearing, and while Justices DIXON and PAINE remained of the same opinion upon the merits they finally agreed in overruling their former decision and returning to the decision in the *Milwaukee & M. R. Co. Case,* on the ground of *stare decisis.* So the law was settled in this state that the act of 1854 was constitutional.

The only thing that can be said to have remained doubtful was the question as to what ground or grounds the decision in the *Milwaukee & M. R. Co. Case* went on. According to Judge SMITH's memorandum, the only contemporaneous written evidence which we have, it went upon two grounds: (1) That if a tax, it did not violate the rule of uniformity because all railroad property was treated alike, and (2) because the court did not deem it a tax within the constitutional provisions (*i. e.* sec. 1 of art. VIII of the constitution). This second proposition can only mean that it was not a tax upon property. According to Judge COLE it was *not* decided that the law did not impose a tax, but Justice PAINE in the final opinion in the *Kneeland Case* treated this difference of opinion as, in fact, immaterial, and said that all that it was necessary to know was that it was held that, if it was a tax, it was no violation of the rule of uniformity, and that the law was held to be no violation of the constitution. It is not very surprising that Judge COLE's recollection should not agree with the written memorandum. Doubtless the discussion in the consultation room took a wide range, and all know how rare it is that two persons will remember a long conversation or consultation alike. Both versions may be practically harmonized on this theory, namely, that it was held not to amount to a property tax under sec. 1 of art. VIII of the constitution, as Judge SMITH says, but *was* held to be an exercise of the inherent taxing power of the state. Judge

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SMITH's memorandum nowhere negatives this theory, but rather tends to support it, while this also justifies Judge COLE's statement that it was not held that the law did not impose a tax. However this may be, it would seem that the question is authoritatively settled in the case of *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833, where it was held, after an historical review of the cases in an opinion by the present chief justice, that "the decision of this court in the case of *Milwaukee & M. R. Co. v. Waukesha Co.* 9 Wis. 449, appears to be eminently sound *on all points involved,* and all contained in subsequent opinions *inconsistent therewith* is hereby disapproved." Just what is meant by "all points involved" may not be entirely certain, although it would seem to refer to the points named in the memorandum of the decision made by Judge SMITH; but there can be little doubt as to what is meant by the phrase "all contained in subsequent opinions inconsistent therewith." The positions which Justices DIXON and PAINE took in the *Plank Road Case* (11 Wis. 35) which were inconsistent with the *Milwaukee & M. R. Co. Case* and upon which the latter case was overruled were that the railroad tax was a tax upon property, and that hence it was void because not uniform under sec. 1 of art. VIII, and these positions are certainly disapproved by the *Taylor County Case.* So we regard it as settled by the necessary effect of the decisions named that the railroad tax legislation of 1854, and *a fortiori* the railroad license legislation of 1860 and of following years, while imposing a tax in the proper sense, did not impose a tax upon property within the meaning of sec. 1 of art. VIII of the constitution, but was in fact excise taxation upon the privilege of transacting business.

But were it conceded that this is not a correct deduction from the decisions cited, and that the only thing settled by them is that the tax is constitutional on some ground not stated, it is impossible for us to see how railway license taxa-

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tion, such as has been in force since the acts of 1860 up to the year 1903, can, in any event, be logically held to be taxation of property. The entire property of the railroad company is exempted from taxation by specific provision of law. How can it be said to be taxed when the law makes it exempt from taxation? A railroad company might have much property in this state, but if it chose at any time to cease to operate its railroad, for any reason, it could not be compelled to pay the license fee, because the fee is only exacted of a person or company "operating" a railroad as a condition of the issuance of a license giving it the privilege to operate its road for the ensuing year. The license fee is paid for the privilege of doing its business. It is strictly a privilege or occupation tax. 2 Cooley, Taxation (3d ed.) ch. 18.

It is matter of history that this occupation or privilege tax has been continuously levied by the state unchallenged since the decision of the *Kneeland Case, supra,* up to the passage of ch. 315, Laws of 1903, and that a very large part of the revenues of the state have been derived therefrom. But, not only this, the same system of taxation by license of business and exemption of property has from time to time been extended to other fields of taxation, until at the present time the property of street railway companies, electric light and power companies, telegraph companies, and telephone companies is and has been for years exempt from taxation, and they have been required to pay an occupation tax or fee, under the license system, for the privilege of transacting their business.

Furthermore, the whole system of licensing domestic insurance companies to transact their business, so far as it is resorted to for the mere purpose of revenue (and it is very evident from the large sums annually collected that revenue as well as regulation is its object), must be justified, if justified at all, as an excise or occupation tax. In the case of foreign companies these license charges may be justified under

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the police power and the right of the state to impose any conditions on foreign corporations before allowing them to do business in this state, as in *Travelers' Ins. Co. v. Fricke,* 99 Wis. 367, 74 N. W. 372, 78 N. W. 407, but in case of domestic corporations, where a license fee is exacted which manifestly greatly exceeds the cost of supervision or regulation of the business, the exaction must be justified, if justified at all, under the power of taxation. *Wisconsin Tel. Co. v. Milwaukee,* 126 Wis. 1, 104 N. W. 1009; Cooley, Const. Lim. (7th ed.) 713.

Thus it seems to us quite certain that the decisions of this court, as well as a half century's practical construction, reinforce the conclusion so strongly suggested by the constitutional debates, namely, that sec. 1 of art. VIII is a section governing the taxation of property alone, and not intended to prohibit the taxation of privileges or occupations; that it really means, as held in the *Taylor County Case* (52 Wis. 37) at page 92 (8 N. W. 854), "Taxes shall be levied upon such property as the legislature shall prescribe by a uniform rule," or "the rule of taxation shall be uniform upon such property as the legislature shall prescribe;" that, so far as the taxation of property is concerned, there can be no classification which will interfere with substantial and practical uniformity of rate (*Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557), and that the clause "the rule of taxation shall be uniform," if applicable to excise taxation at all, means no more than the general equality clauses of the constitution, or "the equal protection of the laws" guaranteed by the XIVth amendment. Taxation of privileges and occupations manifestly cannot be uniform in the sense in which property taxation may be uniform. Property may be all reduced to its money value and a uniform rate levied upon it all; but when occupations, privileges, or property transfers are to be taxed there is no common ground upon which they can meet, no standard by which their relative value or worth

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can be measured or compared; and hence uniformity of taxation or even equality of taxation, as applied to excise taxes, must necessarily mean taxation which does not discriminate, but which operates alike on all persons similarly situated. In other words, proper classification may be made and a different rate applied to each class. 1 Cooley, Taxation (3d ed.) 72, 73; *State v. Applegarth,* 81 Md. 293, 31 Atl. 961; Tiedeman, Lim. of Police Power, 282.

III. These considerations bring us to the third point of the argument, and, in fact, partly answer it, namely, the objection that the tax here in question violates the rule of uniformity. That rule, as applied to excise taxation, meaning simply that there shall be no unjust discrimination, the sole remaining question under this contention is whether the present law violates the true principles of classification. It was said in the *Black Case* (113 Wis. 205, 89 N. W. 522) that "classification between lineals and collateral relatives and strangers does not violate the rule of uniformity nor the principle of equal protection of the laws; and that reasonable exemption of small estates also may be allowed without violating uniformity." While the admissions made by counsel in the *Black Case* tend to deprive this expression of weight as an authority, the arguments in the present case aided by our own investigations have convinced us that the conclusions are correct and sanctioned by the great weight of authority. In order to justify classification there must, of course, be substantial and real differences of situation calling for or reasonably suggesting the necessity for different treatment. That a wife or daughter deprived by death of the care and support of her natural protector stands in substantially a different position from a collateral relative, and that her situation justifies different treatment, goes almost without saying, and that a collateral relative stands in a substantially different position from a mere stranger seems reasonably clear, although in less degree. The authorities are quite unanimous

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in justifying substantially the classification which is embodied in the law, and the supreme court of the United States has approved of it in numerous decisions, notable among which is *Magoun v. Ill. T. & S. Bank,* 170 U. S. 283, 18 Sup. Ct. 594. In view of our construction of sec. 1, art. VIII, of our constitution, by which we hold that it applies simply to property taxation, the question seems to be free from reasonable doubt.

The progressive feature of the act involves greater difficulty. By this feature increased rates of taxation are imposed as the amount of the bequest increases. Thus, if one legatee receives $25,000 and another in the same degree of kinship receives $50,000, while they will both pay the same rate on $25,000, the second legatee will pay a higher rate on his second $25,000. It is said that this is rank discrimination, that there is no difference in situation justifying a difference in classification, and that classification of persons cannot be based on mere differences in ability to pay. If this question were an original one it would seem serious. It is somewhat persuasive to note that railroad license taxes have been levied upon the progressive plan, increasing as the earnings per mile increase, since 1876 without question, and that street railroads and electric lighting companies are now subject to a like progressive rate of taxation. Stats. 1898, secs. 1213, 1222*d*. This fact would not, of course, be conclusive. The question has, however, been met in other courts, and it has been held with substantial uniformity that the progressive feature does not violate the general guaranties of equality and equal protection of the laws contained in the various state constitutions and in the XIVth amendment to the constitution of the United States. *Magoun v. Ill. T. & S. Bank, supra; Knowlton v. Moore,* 178 U. S. 41, 20 Sup. Ct. 747; *Kochersperger v. Drake,* 167 Ill. 122, 47 N. E. 321. The decision of the supreme court of the United States as to the force of the XIVth amendment is necessarily conclusive, and as the general equality guaranties of our own constitution

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are substantially the equivalent of the equal protection of the laws guaranteed by the XIVth amendment, we are content to follow the decisions of the United States supreme court, and hold that the progressive feature does not violate the constitution.

Two minor contentions are made which we deem untenable. The first is that the law imposes a state tax, and violates sec. 5 of art. VIII of the constitution, which declares that "the legislature shall provide for an annual tax sufficient to defray the expenses for each year, and whenever the expenses for any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year sufficient with *other sources of income* to pay the deficiency as well as the estimated expenses of such ensuing year." It seems sufficient to say with regard to this contention that the section relied upon expressly recognizes the fact that the state may have other sources of income aside from a direct tax upon property, and the section quoted is simply intended as a regulation or provision covering the levying of a direct tax upon property, if such a tax be necessary.

The second contention is that the act is unconstitutional because it commits certain matters concerning the administration of the law, such as the fixing of the value of the property inherited or bequeathed and the amount of the tax, to the county court, and these are said to be administrative, not judicial duties. The argument does not appeal to us. The law fixes the tax; the court, as an incident in the settlement of the estate, simply determines, in a judicial way, certain facts necessary to be ascertained to determine how much the tax fixed by law amounts to in a given case. These duties seem to us as judicial in their character, and very properly intrusted to the county court in which the estate is being administered.

By the Court.—The demurrer is sustained and judgment dismissing the complaint ordered, with $25 attorney's fees and necessary disbursements, to be taxed.

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MARSHALL, J. (*concurring*). I concur in all that is said in the opinion of the court written by my brother WINSLOW. I choose to add a few words, more by way of emphasis than for any other reason.

It should be cause for much gratification to all who appreciate the principles of constitutional liberty, now so signally vindicated, that, rising above the influence of mere precedent, the court has the courage to cut loose from a judicial error that has been almost universally proclaimed by the courts of this country for many years—again demonstrating that

> "Truth crushed to earth shall rise again;
> The eternal years of God are hers;
> But Error, wounded, writhes with pain,
> And dies among his worshippers."

As we face and try to measure the limitless significance and importance of the conception of that great change in civil government from the old order to the one under a written constitution, we are utterly unable to harmonize it with the idea, inconsiderately expressed at first, and followed, thereafter, without original thought upon the subject, as it seems, that the transmission and taking of property through inheritable blood or by will rests in sovereign grace and not in right, and that it is competent for the law-making power to abolish all regulations on the subject, leaving property, upon the circumstance of the death of the owner, liable to be seized upon and enjoyed by the first taker or to escheat to the people as a whole. How that relic of a system recognizing a personal, earthly sovereign as the source of all power and opportunity to acquire and enjoy and transmit the fruits of individual energy, could have been regarded as the light to guide judicial footsteps under a system dignifying former so-called privileges or graces as rights, puzzles the mind. True, it has been affirmed over and over again by judges and courts of the highest respectability. Eminent jurists whose names are written high in the temple of judicial fame have stood spon-

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sors for it. But the greatest errors of the past have had the most distinguished supporters. If it were true that error could be sanctified by mere weight of the number or ability of its advocates, and be given the character of infallible truth by the mere force of repetition, then the error that the constitutional guaranties do not reach the subject we are considering would have long ago taken such deep root that the most courageous could not have hoped to dislodge it. But such, as experience shows, is not the case. Error, though often repeated, is error still, and because it is error it is mortal and must be swallowed up by immortality. We may well hope that the position of this court, now taken, will mark a return movement to a better appreciation of the great change which the constitution made from a form of personal government, unrestrained, in the ultimate, except by the conscience of the sovereign, to a government by the people under the restraints of a written constitution setting up the standard necessary to life, liberty, and the pursuit of happiness; and creating a judicial system, independent of all other departments, with supreme power to guard that standard.

The very opening lines of the immortal Declaration mark one of the greatest changes wrought in human affairs. It was not the mere expression of a sentiment; it was the declaration of a fundamental truth designed to stand for the future as the central object of civil government, and to be a test of the legitimacy of legislative action: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by the Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."

Upon that all the constitutions of the land, state and national, have been builded. If there were any purpose at all in that declaration and the incorporation of it into all constitutions, it was to mark the beginning of a new era, one when those things regarded to be essential to human life, hu-

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man liberty, and human happiness should no longer be legitimately referred to as subjects of enjoyment by mere sovereign grace, but should have the dignity of absolute rights, regulated by laws reasonably necessary to their preservation and enjoyment; not subject to regulation beyond that boundary and into the realms of destruction.

It was that conception of the constitution in the soul of Daniel Webster, when in the last years of his life, looking backward at the dangers successfully passed, and facing in contemplation those yet to come, he said:

"I love the constitution of the country. I have a passion for it, the only political passion that ever entered into my breast; I cherish it day and night; I live on its healthful, saving influences, and I trust never, *never,* NEVER to cease to heed it till I go to the grave of my fathers. The constitution of the United States! What is there on the whole earth; what is there that so fills the imaginations of men under heaven; what is there that the civilized, liberalized, liberty-loving people of the world can look at, and do look at, so much as that great and glorious instrument, held up to their contemplation, blazing over the Western Hemisphere, and darting its rays throughout the world, the constitution of the United States of America!"

Facing that not overdrawn picture, who could fail to appreciate that a radical change was wrought by our organic law, or doubt but what included among those unalienable rights so forcibly proclaimed and impliedly or expressly guaranteed is that of complete enjoyment of personal acquisitions, subject only to reasonable regulation? Why turn aside and test the dignity of individual possessions in that respect by the very system which the change was designed to replace?

When I wrote the concurring opinion in *Black v. State,* 113 Wis. 205, 89 N. W. 522, proclaiming the doctrine, and without disfavor by my brethren, which the court has now so emphatically vindicated, I affirmed that the power to tax the right to inherit and to take by will, as property or the rep-

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resentative of property, and make all reasonable regulations of such rights, which include reasonable revenue measures, exists and may well be exercised. Doubtless that may be done in either of two ways, viz.: under sec. 1, art. VIII, and independently thereof, limited by equality clauses of the constitution, which prohibit unjustifiable discriminations and legislation destructive of the right. The latter method was well known when the change to the present system of government in this country occurred. There were regulations for the purpose of revenue, and, besides, there was the overshadowing power to withdraw the privilege entirely. The latter was abrogated when the privilege, so called, was given the dignity of a right. Power as to the former was not affected. It can be exercised, subject to constitutional limitations. When the legislation in that regard passes the boundary of regulation and becomes discriminatory, or burdensome because not a reasonable taxing measure and therefore confiscatory, it meets the bar of the constitution. Further liberty than that to deal with property rights on the occasion of the death of an owner is a relic of the past. It has no legitimate place in our system of constitutional liberty.

Dodge, J. (*dissenting*). I find myself unable to yield assent to the conclusion of the court in this case that the legislature has not transgressed the limitations clearly imposed by the constitution upon the powers delegated to that branch of the government. With several of the steps of reasoning declared as leading to that conclusion I have no quarrel. Thus, I do not doubt that the general grant of legislative power includes authority to lay taxes upon substantially all subjects, at least all subjects commonly recognized in 1848 as customary and proper. Among such subjects were transfers of property, prosecution of business of all kinds, and, indeed, the exercise of any rights or privileges. Neither can I avoid the conclusion that this general power to lay

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taxes is not limited to property as the only subject by the clause in sec. 1, art. VIII: "Taxes shall be levied upon such property as the legislature shall prescribe." I am convinced, after much consideration of the constitutional debates, that such clause was inserted merely to declare authority in the legislature to exempt some property and to tax some. I am also clear that among the transactions recognized as legitimate subjects of taxation by imposition of an excise tax, duty, or impost is the transmission of property, upon death of its owner, to his descendants or legatees. Whether such transmission rests on inherent right such as the government cannot take away, or upon a mere privilege which the legislature might accord or deny, in its discretion, as so generally asserted by high authority both legal and economic, I deem a wholly academic question here. If the former, the transfer, like other transfers of property, is a customary and proper subject of taxation. If a mere privilege, resting in grant by the legislature, still that grant has been made, and a legal right of inheritance has been established, and the statute under consideration obviously provides merely for a tax upon a recognized and existing right, not for the revocation or denial of such right even in part.

After assenting to all these positions, however, I still find, in our constitution, limits upon the power of the legislature to lay even an excise tax upon transfers of property. Sec. 1, art. VIII, declares that the "rule of taxation shall be uniform." I can find nothing in the constitutional history to support the view that this behest applies only to some taxes and not to others. Its association in the same section with the clause above quoted authorizing the legislature to prescribe the property on which taxes shall be laid, and, inferentially, that which shall be exempt from taxation, does not to my mind even suggest that the uniformity clause has application merely to taxation of property. It must be remembered that this behest for uniformity, with slight difference

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in form, was in the draft of the constitution as a separate section, and was never the subject of serious question or debate. It is also obvious that the members of the convention considered that the "taxes" or "taxation," contemplated as within the power of the legislature, included taxation by means of excise or duty upon occupations and privileges. The discussion quoted in the court's opinion shows uniform assumption of this fact. The next section was obviously framed originally in recognition of the necessity of some exception to this rule of uniformity, due to the fact that, in application of the taxing power to property, some must be exempt and some other ought to. Federal property could not be taxed; taxation of state or municipal property would be absurd; while certain other classes, like ecclesiastical or educational property, might wisely be omitted. The discussion resulted in a decision to confer on the legislature full control over the subject of exempting property from taxation; but there is no hint of any purpose to further narrow the requirement that the legislature pursue a uniform rule in all taxation, whether on property as a subject or, by excise, on occupations, transfers, and the like. Nor can I discover any difficulty in practical application of such a requirement. True, there can be no uniformity between an inheritance tax and a peddlers' license tax, because there can be no comparison, but each can be laid by a uniform rule. All the decisions of this court support that view. If, as now declared, the railroad licenses were mere occupation taxes, it was certainly assumed, both in *Milwaukee & M. R. Co. v. Waukesha Co.* 9 Wis. 431, and in *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833, that uniformity within the class was required, and such necessity was decided as to peddlers' licenses if they must rest on the taxing power. *State v. Whilcom,* 122 Wis. 110, 118, 99 N. W. 468. Again, the requirement of uniformity of rule has repeatedly been held to permit classification of subjects of taxation provided uniformity

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in the class is maintained (*Milwaukee & M. R. Co. v. Waukesha Co., supra; Wis. Cent. R. Co. v. Taylor Co., supra; Kingsley v. Merrill,* 122 Wis. 185, 99 N. W. 1044; *Black v. State,* 113 Wis. 205, 89 N. W. 522; *State v. Whitcom, supra*); also as to inheritance taxes in *State ex rel. Sanderson v. Mann,* 76 Wis. 469, 477, 45 N. W. 526, 46 N. W. 51, and *Black v. State, supra.* However, I do not consider the uniformity clause at all essential to my conclusions in this case.

Even if it has no application to taxation by excise, yet in sec. 1, art. I, of the constitution of Wisconsin we find limitation upon the powers delegated to the government which the people created by that instrument:

"All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

This section, while in form merely declaratory of general principles, has been repeatedly held to so evince the conception of private and individual rights of the people of this state which must be sacred against violation by the government which they consented should exist over them, that it declares a limitation upon the powers of that government. *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561; *Black v. State,* 113 Wis. 205, 219, 89 N. W. 522; *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098; *State v. Whitcom,* 122 Wis. 110, 118, 99 N. W. 468. Indeed, the opinion filed on behalf of the court concedes, with the fairness which always characterizes its author, that this section of our constitution requires this, like all laws, to be free from arbitrary discriminations for or against any persons or class of persons not distinguishable from others in respects germane to taxation. In this first utterance of our constitution is declared the keynote and dominating principle of the social organization established by it, namely, equal-

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ity before the law of every individual. Whatever may be thought at this day by political scientists or theorists as to the ideal government or society, the conception of our forbears was a government not primarily for its own convenience, but for the protection of the individual rights of those who were to live under it. Government was not the end but merely the means to secure individual liberty and happiness.

The question is whether equality before the law is maintained when one is required to pay for support of government a higher rate than another upon an entirely similar kind and amount of property or an entirely similar right, privilege, or transaction because he is either poorer or richer than another. Under the present law the second cousin recipient of $25,000 or less pays four cents upon each dollar, while the second cousin recipient of $50,000 pays five, and he who receives a million pays over ten. Or, to state the situation in another way, one receiving $25,000 pays for the privilege or on the transaction $1,500 if he also receives another $25,000, or $3,000 if he receives other $500,000; while another, in the same propinquity, pays but $1,000 upon the privilege or transaction of receiving $25,000 if he receives no more. Remember that if such classification as this is legitimate, if the rate may be varied according to the magnitude of the bequest or inheritance, the legislature, in its wisdom, may invert the variation and charge the higher rate on the smaller amount, with progressive diminution as the amount increases; may charge the recipient of $25,000 twelve per cent. thereon, the recipient of a second $25,000 only ten per cent., and, finally, the recipient of $25,000 in excess of $500,000 only the basic rate of four per cent. These illustrations will serve concretely to present the question whether this is equality before the law such as the founders of our state contemplated. Let me ask my brethren of the majority whether, if there were no uniformity clause but merely the assurance of equality, they would deem permissible a law

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taxing a $50,000 house either twice the rate or one half the rate laid on a $10,000 one. I cannot believe any of them would answer in the affirmative.

Nothing seems to me more an outrage upon equal rights than discrimination by the law in favor of or against either the poor or the rich by reason of that fact, and nothing seems more to threaten the permanence and safety of society. True, one witnesses with more equanimity unequal and excessive burdening of those who can endure it without actual privation or physical suffering; but, if the principle of classification on such lines be established, what assurance can we have that the burdens will remain there? Under a republican form of government a class once formed may gain ascendency in control of government, and, if a political classification of our people into the rich and the poor be brought about, which is likely in the long run to dominate? Intelligence, education, and energy have always proved superior to mere numbers, and where are these qualities more likely to predominate? Will it not be with the class which contains those who have been able to conquer in the fields of industry, commerce, and finance, and who, in those fields, have been able to bring under their control the armies of men whose existence depends on daily labor? Political warfare between such classes is to be deplored, but, if the issue be forced, mere numbers must, for a time at least, be subordinated, and we face a probability that the principle sustained in this law may be reversed in its application. In equality before the law is the only assurance of opportunity to each to gain social equality and equal prosperity with any other. True, the supreme court of the United States has held such progressive rates of taxation not forbidden by the XIVth amendment to the federal constitution prohibiting denial of "equal protection of the laws," but I nowhere find any satisfying argument to show that amount or value of property or right is a legitimate distinction germane to a classification of it for varying rates of a tax or

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excise based on value. Indeed, that court seems to have refrained from interfering on the ground that the XIVth amendment was not intended to restrain the discretion of the states in the field of taxation. However, the decisions of the supreme court of the United States upon the meaning of the XIVth amendment are not controlling upon us in measuring the equality which our constitution secured many years before that amendment was framed. The reasoning of such cases as *State ex rel. Garth v. Switzler,* 143 Mo. 287, 331, 45 S. W. 245; *State ex rel. Schwartz v. Ferris,* 53 Ohio St. 314, 41 N. E. 579; *Estate of Cope,* 191 Pa. St. 1, 21, 43 Atl. 79; BREWER, J., in his dissenting opinion in *Magoun v. Ill. T. & S. Bank,* 170 U. S. 283, 301, 18 Sup. Ct. 594, seems to me sound and convincing, and to at least so throw in conflict the authorities that the conclusion reached by my brethren ought to be supported by some reasoning other than mere deference to authority.

CASSODAY, C. J. (*dissenting*). I am forced to dissent respectfully from the decision of the court in this case. I concur with the conclusion of my brother DODGE, that ch. 44, Laws of 1903, is unconstitutional and void. I will simply add that, to my mind, it is very obvious that that act imposes a tax upon property within the meaning of the clause of the constitution which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe" (sec. 1, art. VIII, Const.). It purports to be a "tax imposed on property of any kind transferred." Sec. 1. It is therein declared that "the tax so imposed shall be upon the clear market value of such property at the rates hereinafter prescribed and only upon the excess of the exemptions hereinafter granted." Subd. 6, sec. 1. It is also therein declared that "every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is so transferred

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and the administrators, executors, and trustees of every estate so transferred shall be personally liable for such tax until its payment." Sec. 5. The several exactions made in the act are each and all based upon and measured by property. My reasons for saying that the act imposes a tax on property within the meaning of the constitutional clause quoted are sufficiently stated in my separate opinion in the case of *State v. Railway Cos.* [128 Wis. 449] decided herewith. Being a tax on property, it was, as indicated in that opinion, subject to classification "founded upon real differences, affording rational grounds for a distinction." *Black v. State,* 113 Wis. 205, 219, 89 N. W. 522. In my judgment such classification cannot be founded upon mere differences in value, as in the act in question. On the contrary, such classification, to my mind, is purely arbitrary and highly destructive of the equal rights guaranteed by the constitution.

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CASES DETERMINED

AT THE

August Term, 1906.

ABRAHAMS, Appellant, vs. REVILLON FRERES, Respondents.

April 30—October 9, 1906.

Contracts: Offer and acceptance: Authority of agent.

1 Defendants' buyer of raw furs gave plaintiff, a local dealer in pelts, etc., a written memorandum, dated at Green Bay, January 16, stating that he would "take up, at his selection, goods from [the plaintiff], only this section goods, at the following prices up to sales in January or on or about February 1." Prices for skins were specified, and the writing was signed by the buyer for the defendants. The term "selection," as used in the fur trade in that locality, in connection with a sale of an entire lot of furs to be gathered from a stated section, was found by the jury to mean "the right only to determine what furs are from such section." On January 29 plaintiff wrote to defendants that he had got the goods completed and that defendants should come and get them. *Held*, that the memorandum was a continuing offer to take from the plaintiff, at the prices therein named, such goods as were therein described which he might acquire from that section within the period mentioned, and that plaintiff's letter was an acceptance of such offer, which thereupon ripened into a contract.

2. The evidence (stated in the opinion) is *held* sufficient to sustain a finding of the jury that plaintiff was justified in believing that defendants had given the buyer authority to contract for them for furs to be gathered and delivered in the future, and a further finding that the buyer had in fact such authority.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

The complaint alleges, in effect, that at the times mentioned

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therein the plaintiff was a dealer in hides, pelts, furs, and wool at Green Bay; that the defendants, whose individual names are unknown to the plaintiff, were, during said times, copartners engaged as manufacturing furriers and wholesale fur dealers in Chicago, New York, and Europe; that January 16, 1904, at Green Bay, the plaintiff and the defendants entered into a contract whereby the defendants agreed to take all of the plaintiff's purchase of furs up to February 1, 1904, at the agreed price of $2.50 for minks, $1 for skunks, $1.50 for raccoons, twenty-five cents for rats,—red fox and other goods; that between January 16, 1904, and February 1, 1904, the plaintiff purchased, secured, and had, of such furs, 752 mink, 900 skunk, 324 raccoon, 5,621 muskrats, and 42 red fox, for the purpose of filling the said contract; that during said time and on or about February 1, 1904, the plaintiff notified the defendants that he had on hand said furs to fill said contract, and tendered the same to the defendants, and requested them to take the same and pay therefor according to said contract; that the plaintiff was ready and willing at all times to keep and perform said contract on his part, but the defendants wholly and wrongfully refused to take said furs or any of them, or to pay for the same, to the plaintiff's damage in the sum of $1,065.32, by reason of being forced to sell the same at great loss, the market therefor having declined, the amount stated being the sum realized less than the defendants had contracted to pay therefor, for which amount the plaintiff demands judgment, with costs. The defendants answered by way of admissions that the plaintiff was engaged in business as alleged, and that the defendants were copartners engaged in business as alleged, but otherwise denied each and every allegation of the complaint.

At the close of the trial the jury returned a special verdict as follows:

"(1) Is the term *'selection'* used, in the fur trade, in this locality, in connection with a sale of an entire lot of furs to

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be gathered from a stated section, as designating the right only to determine what furs are from such section? *A.* Yes. (2) Was the plaintiff justified in believing that the defendants had given Mr. Ball authority to contract for them for furs to be gathered and delivered in the future? *A.* Yes. [Changed by the court to 'No.'] (3) Had Mr. Ball authority to contract for the defendants for furs to be gathered and delivered in the future? *A.* Yes. [Changed by the court to 'No.'] (4) What quantity of furs of the kinds mentioned in Exhibit 1 did the plaintiff have on hand for delivery to the defendants on or about February 1, 1904? *A.* 752 mink, less 2 per cent. trash, 737. 900 skunk, less 4 per cent. trash, 864. 324 raccoon, less 3 per cent. trash, 315. 5,621 rats, less no per cent. trash, 5,621. (5) What was the market price of said furs on or about February 1, 1904? *A.* The mink, $2.05; total, $1,510.85. The skunk, 81 cents; total, $699.84. The raccoon, $1.04; total, $327.60. The rats, 18 cents; total, $1,011.78."

After the return of such verdict the plaintiff moved for judgment thereon against the defendants for $1,041.13 damages and for the costs and disbursements of the action, which motion was denied by the court. The defendants moved to strike out the answers of the jury to the first, fourth, and fifth questions of the special verdict as immaterial, and change the answers of the jury to the second and third questions from the affirmative to the negative, and, upon the verdict so amended and the uncontradicted evidence, for judgment dismissing the complaint, with costs, and that, in case such motion should not be granted, then to set aside the verdict and for a new trial. Thereupon the court ordered that the answers of the jury to the second and third questions submitted should be changed from the affirmative to the negative, and the court further ordered that, upon the said special verdict as amended, and upon the undisputed evidence and the whole record in said case, said defendants have judgment against the said plaintiff dismissing the complaint, and for their costs and disbursements in the action. From the judgment so en-

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tered in accordance with such order of the court herein the plaintiff appeals.

The contract or agreement referred to in the complaint and in the fourth question of the special verdict as Exhibit 1 is as follows:

"*B. Abrohams,* Dealer in Hides, Pelts, Furs, Wool, Tallow, Rags, Rubbers, Metal, and Scrap Iron.

"Green Bay, Wis., Jan. 16, 1904.

"W. E. Ball will take up, at his selection, goods from the above concern, only this section goods, at the following prices up to sales in January or on or about Feb. 1st, 1904:

Mink, no trash	$2 50
Skunks, " "	1 00
Raccoon, " "	1 50
Rats, " "	25

Red fox, and other goods, as to values.

"W. E. Ball, for *Revillon Freres.*"

For the appellant there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.* They argued, among other things, that no element of a contract is lacking. What was uncertain as to quantity must necessarily become certain at the end of the collection of furs by plaintiff, or as measured by the usual course of the business. *Shadbolt & B. I. Co. v. Topliff,* 85 Wis. 513; *McCall Co. v. Icks,* 107 Wis. 232; *Excelsior W. Co. v. Messinger,* 116 Wis. 549; *W. G. Taylor Co. v. Bannerman,* 120 Wis. 189; *Eastern R. Co. v. Tuteur,* 127 Wis. 382, 105 N. W. 1067; *Wells v. Alexandre,* 130 N. Y. 642, 29 N. E. 142; *Minn. L. Co. v. Whitebreast C. Co.* 160 Ill. 85, 43 N. E. 774; *Hickey v. O'Brien,* 123 Mich. 611, 82 N. W. 241; *Nat. F. Co. v. Keystone Mfg. Co.* 110 Ill. 427.

For the respondents there was a brief by *Sheridan & Evans,* and oral argument by *W. L. Evans.* They contended, *inter alia,* that the alleged contract, even if accepted by the plaintiff, is a mere *nudum pactum* and is void for uncertainty, entire want of consideration, and lack of mutuality. Mr. Ball did not agree to take any definite amount of goods. A desig-

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nation of the article sold must be sufficiently contained in the memorandum, which cannot be added to or varied by parol evidence. *Russell v. Wis., M. & P. R. Co.* 39 Minn. 145, 39 N. W. 302; Benj. Sales (7th Am. ed.) 225; 23 Cent. Dig. col. 2274; Browne, Stat. Frauds, § 385; *Stewart v. Cook,* 118 Ga. 541, 45 S. E. 398; 29 Am. & Eng. Ency. of Law (2d ed.) 874. See, also, *Wells v. M. & St. P. R. Co.* 30 Wis. 605; *Beers v. North M. T. S. Co.* 93 Wis. 569; *Irish v. Dean,* 39 Wis. 562; *Hoffman v. Maffioli,* 104 Wis. 630, 47 L. R. A. 427; *Moulton v. Kershaw,* 59 Wis. 316; *Chicago & G. E. R. Co. v. Dane,* 43 N. Y. 240; *Teipel v. Meyer,* 106 Wis. 41; *Swanson v. Andrus,* 83 Minn. 505, 86 N. W. 465.

The following opinion was filed May 8, 1906:

CASSODAY, C. J. The important question is whether the trial court was justified in changing the answers of the jury to the second and third questions from the affirmative to the negative. By such ruling the court in effect held, notwithstanding the evidence and findings of the jury to the contrary, that the plaintiff was not "justified in believing that the defendants had given Mr. Ball authority to contract for them for furs to be gathered and delivered in the future," and that Mr. Ball had no "authority to contract for the defendants for furs to be gathered and delivered in the future." This makes it necessary to consider some of the evidence in the case.

Mr. Ball was the first witness called by the plaintiff, and he testified to the effect that he lived in New York; that he knew the defendants; that they do business in Chicago, New York, Montreal, Paris, London, and other foreign places, and had for a great many years; that he was a salesman and buyer of raw furs for the defendants; that he only traveled through Wisconsin, Minnesota, and Dakota on the raw furs; that he traveled all over the country on selling goods. Exhibit 1, referred to in the complaint and the special verdict and set

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forth in the foregoing statement, being shown to the witness, he testified: "This is my signature. The entire body of the instrument is in my handwriting."

Mr. Ball was subsequently called as a witness and examined by the defendants, and, among other things, testified to the effect that his business was salesman and buyer of raw furs for the defendants; that he had been engaged in that business for thirty-two years; that during about fifteen years of that time he had made purchases of furs in the vicinity of Green Bay; that he was acquainted with the plaintiff and had known him for four or five seasons; that he had done business with him during that period of time; that he purchased furs from him during that time; that he never before entered into any written contract with the plaintiff; that he had on several occasions purchased furs from the plaintiff; that during his acquaintance with the plaintiff he had bought at least one-half dozen lots from him, and perhaps more; that he never told the plaintiff that he was not authorized to make a purchase for future delivery; that January 16, 1904, he purchased a lot of furs from the plaintiff; that the plaintiff then requested him to leave a price list—what the house would pay for delivery February 1, 1904, or the January sales,—and so, at the request of the plaintiff, he wrote the alleged contract; that his usual method of buying is not to look at the goods until the seller gets his figures on the quantities, and then he goes to the lots and sorts them; that if the goods were not up to the class of goods wanted for the New York concern for which he purchased, then he would offer a price so low that it would not be accepted by the seller, but if the goods came up to his opinion of them, then he would buy them. He was further allowed to testify, against objection, that he had no authority to make contracts for the purchase of skins without advising the house; that he had no authority to sign contracts for any goods to be purchased in advance without advising the house; that he had no express authority to contract orally

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or in writing for future delivery; that he believed he signed one contract for the defendants with Frank Pursey of Oshkosh, by telegram and communication from the house; that in other instances the contract had been sent on to the house and kept up and delivered; that he could not call to memory the percentage of trash in the amount he bought of the plaintiff January 16, 1904, without having his assortment; that in every purchase he knew the exact percentage, and that his assortments would stand against the assortment by the grademen of the house of the defendants.

There is evidence on the part of the plaintiff tending to prove that he never requested Ball to give him a price list at the time of making Exhibit 1; that at that time Ball told him that he wanted to contract for the plaintiff's goods; that Ball wrote the contract himself and said that he had made contracts for future delivery with other persons, including Pursey of Oshkosh; and that Ball never at any time told the plaintiff that he had no authority to purchase for future delivery.

The alleged contract, Exhibit 1, so admitted to have been written by Mr. Ball and signed by him, "W. E. Ball, for *Revillon Freres,*" speaks for itself. If it was intended by him to be a mere price list, furnished at the request of the plaintiff, he hardly would have signed it for and in the name of the defendants. Speaking for the defendants, he said, in effect, that he would take up goods from the plaintiff, exclusive of trash, at the prices therein named up to February 1, 1904. The promise to take up the goods, exclusive of trash, during the limited period mentioned, constituted no part of a mere price list. True, the offer was limited to "only this section goods" and "at his selection." But "the term 'selection' used in the fur trade," as mentioned in the question submitted, was found by the jury to be "the right only to determine what furs are from such section." The trial court refused to set aside that finding of the jury, and

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hence the same must be regarded as a verity. True, the writing did not constitute a bill of sale of any goods, nor, of itself, did it constitute a binding contract between the parties. But it was, manifestly, a continuing offer to take from the plaintiff such goods as were therein described, at the prices therein named, and which he might acquire from that section during the fifteen days therein mentioned.

Did the plaintiff accept such offer? It is admitted that January 29, 1904, the plaintiff wrote to the defendants to the effect that he had got the goods completed and that the defendants should come and get them. On the next day the defendants—"*Revillon Freres,* per W. E. Ball"—answered that letter as follows:

"Chicago, Jan. 30, 1904.

"*Mr. B. Abrohams,* Green Bay, Wis.

"Dear Sir: Yours of the 29th inst. at hand. In reply will say the writer will be in your section some day the coming week. The markets at London show a big decline; skunk 20 per cent.; mink 10 per cent.; rats 15 per cent.; red fox 10 per cent.; coon 25 per cent.; gray fox 35 per cent. Look for further decline in March.

"Yours respectfully."

February 10, 1904, the plaintiff telegraphed the defendants at Chicago: "Why don't you come? We are waiting. Wire at once." On the same day the defendants wrote the plaintiff: "We have duly received the telegram sent Mr. Ball, and forwarded it at once to him. Mr. Ball being out of town just now, we cannot tell when he may be able to call on you. Yours truly, *Revillon Freres,* per V. G." On the next day the defendants telegraphed the plaintiff: "Have forwarded yours. Ball out of town. Will not be able to call this week." Notwithstanding the decline in the London market for such goods, as mentioned in the letter of the defendants of January 30, 1904, in answer to the plaintiff's letter of the day before notifying them that he had completed the accumulation of goods and requesting them to come and get them, yet the de-

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fendants did not decline to take the goods, as promised in the offer, until their letter of February 11, 1904, dictated by Mr. Ball, which refusal is therein stated to be "on account of the large decline in raw furs." That letter was not received by the plaintiff until February 13, 1904, when the plaintiff at once notified the defendants by telegram to come at once and take the goods at the prices named in their contract, and on the same day wrote the defendants at length to the effect that, if they did not come and take the goods as agreed in the contract, he would "be compelled to find an immediate sale for the furs, and to hold" the defendants "for damages for the differences between" their "contract price with" the plaintiff and what he might "receive in the market."

The evidence thus summarized is taken principally from the testimony of Mr. Ball and the correspondence between the parties. There is other testimony tending to support the plaintiff's contention. We are constrained to hold that the evidence is sufficient to sustain the finding of the jury, not only that the plaintiff was justified in believing that the defendants had given Mr. Ball authority to contract for them for furs to be gathered and delivered in the future, but also sufficient to sustain the finding that Mr. Ball had such authority. It also appears from the undisputed evidence that within the fifteen days mentioned in the offer of the defendants the plaintiff accepted the same, and notified the defendants that he had completed the collection of such goods and that they should come and get them. By the answers to the fourth and fifth questions submitted, the jury found the quantity of furs of the kind mentioned in Exhibit 1 that the plaintiff had on hand for delivery to the defendants on or about February 1, 1904, and also the market price of said furs at that date. The trial court declined to strike out such answers, and hence such findings must be regarded as verities in the case. We are constrained to hold that the plaintiff's acceptance of such offer constituted a binding contract be-

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tween the parties. Thus it was said many years ago by the supreme judicial court of Massachusetts:

"Though the writing signed by the defendant was but an offer, and an offer which might be revoked, yet, while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance, and during the whole of that time it was an offer, every instant; but as soon as it was accepted, it ceased to be an offer merely, and then ripened into a contract." *Boston & M. R. v. Bartlett,* 3 Cush. 224, 227.

That language has received the express sanction of this court. *Sherley v. Peehl,* 84 Wis. 46, 52, 54 N. W. 267. See, also, *Hoffman v. Maffioli,* 104 Wis. 630, 80 N. W. 1032; *Brittingham & H. L. Co. v. Manson,* 108 Wis. 221, 84 N. W. 183; *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 555, 556, 93 N. W. 459. So, as to the authority of Mr. Ball to make the written offer of January 16, 1904, this court has declared:

"It is well understood that every delegation of power carries with it the authority to do all those things which are reasonably necessary and proper to carry into effect the main powers conferred, and which are not forbidden, and that secret instructions cannot affect such apparent powers to the detriment of third persons who have dealt with the agent on the basis of his apparent authority." *Parr v. Northern E. Mfg. Co.* 117 Wis. 278, 287, 93 N. W. 1099, 1102.

Such is said to be "a fundamental principle in the law of agency." Mechem, Agency, § 280.

It follows from what has been said that the motion of the plaintiff for judgment in his favor upon the pleadings, evidence, and special verdict should have been granted.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in favor of the plaintiff and against the defendants as indicated in this opinion

A motion for a rehearing was denied October 9, 1906.

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DONNER, Respondent, vs. GENZ, Appellant.

May 10—October 9, 1906.

Pleading: Amendment to conform to evidence: Appeal: Findings of fact, when disturbed.

1. **Where in justice's court the answer was held to contain a sufficient denial of plaintiff's claim and the evidence thereunder was received without objection, and upon appeal the circuit court treated the answer as sufficient or as having been amended to conform to the evidence, it will be so treated upon appeal to the supreme court.**
2. **The rule that findings of fact by the circuit court will not be disturbed on appeal to the supreme court unless they are against the clear preponderance of the evidence is applicable to a case determined in the circuit court upon the record of a justice of the peace before whom the original trial was had. Nothing in sec. 3769, Stats. 1898, conflicts with that rule. *Fintel v. Cook*, 88 Wis. 485, explained.**

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

This is an action to recover the balance due for certain logs sold by the plaintiff to the defendant. The action was commenced in county court, having jurisdiction of a justice of the peace, and there prosecuted to judgment. An appeal taken to the circuit court was determined upon the record returned from the county court. The evidence tends to establish the following as facts:

An agreement was made between the parties for the sale of logs lying in plaintiff's woods at $5 per M., the logs to be scaled by the scaler of the Paper Mills Company. Plaintiff gathered the logs together, and as they were taken away he scaled them in the presence of the defendant, the defendant observing the scaling and writing down the figures. The logs were then delivered to the defendant and were subsequently scaled by the scaler of the Paper Mills Company along with other logs belonging to the defendant. The scale of these logs

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by the Paper Mills Company's scaler was not separate from the others. Defendant found that his logs were scaling short and wished the scaler to make a separate scale of the logs purchased from the plaintiff, but the logs were partly under water and partly covered by snow, and the scaler was unable to scale them accurately and therefore made an estimate. In this estimate he deducted a considerable amount as for defective material. It is claimed by the defendant that the logs were partly dry and partly sap rotted, and that for this reason there was not more material in them than the highest amount estimated by this scaler. The estimate made by the Paper Mills Company's scaler was 2,400 feet or less. The scale made by the plaintiff with the assistance of the defendant amounted to 4,685 feet. Twelve dollars has been paid, and this is claimed by the defendant to be a payment in full. Judgment was asked for the balance, $11.40, which would be due on the scaling made by plaintiff and defendant. In his evidence the defendant admitted that he had intended to pay the balance which would be due according to the scale made by himself and the plaintiff until he learned that his logs were scaling short.

The county court awarded judgment for the plaintiff for the amount claimed. On appeal to the circuit court the judgment of the county court was affirmed, the court finding that all the allegations of the complaint were true. This is an appeal from the judgment of the circuit court.

The cause was submitted for the appellant on the brief of *Ryan & Runke,* and for the respondent on that of *John Van Hecke.*

The following opinion was filed June 21, 1906:

Siebecker, J. Error is assigned upon the ground that the evidence is not sufficient to sustain plaintiff's cause of action. Respondent argues that the answer contains no denial of plaintiff's cause of action, and that judgment should have

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been awarded upon such default for the amount claimed. The record discloses that the county court held that the answer sufficiently alleged a denial of plaintiff's claim, and the circuit court apparently so treated it or deemed the pleading amended to conform to the evidence actually presented. We find nothing in the record showing why the evidence, which was received without objection, was not properly before the circuit court and to be considered in determining the rights of the parties. Under such circumstances the pleadings will be deemed to be amended, on appeal, so as to admit the evidence. *Packard v. Kinzie Avenue H. Co.* 105 Wis. 323, 81 N. W. 488; *Coe v. Rockman,* 126 Wis. 515, 106 N. W. 290; *Gill v. Rice,* 13 Wis. 549.

The judgment appealed from awards plaintiff recovery of a balance claimed to be due him for the purchase price of logs sold to the defendant. The evidence adduced on this question is in conflict. The county and the circuit courts both found that this cause of action was established by the evidence. We have read the evidence and find that it is of such weight in support of the findings of fact of the trial courts that we cannot say that the findings are against the clear preponderance of the evidence. The judgment should stand.

By the Court.—Judgment affirmed.

The appellant moved for a rehearing, and the following opinion was filed October 9, 1906:

PER CURIAM. We find no support for the contention that this court in cases of appeal to circuit courts, where the case is tried on the record of the justice of the peace before whom the original trial was had, is not governed by the rule expressed in the opinion, to the effect that since the findings of facts of the circuit court are not against the clear preponderance of the evidence they cannot be disturbed. None

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of the cases cited (*Campbell v. Babbitts,* 53 Wis. 276, 10 N. W. 400; *Hassa v. Junger,* 15 Wis. 598; *Silvernail v. Rust,* 88 Wis. 458, 60 N. W. 787) pass upon this question. So far as the subject was considered in those cases, it related to the question of whether the judgments appealed from were supported by the evidence. This is a wholly different inquiry from the one now suggested, which asks reversal of the judgment of the lower court in such cases on appeal to this court on the ground that the judgment is not supported by the weight of the evidence. Nothing in the provisions of sec. 3769, Stats. 1898, conflicts with the rule of this court that the conclusions of the trial court will not be disturbed on appeal to this court unless they are against the clear preponderance of the evidence. The language of the court in *Fintel v. Cook,* 88 Wis. 485, 60 N. W. 788, that this court in such cases is not prevented from ordering an affirmative judgment according to the weight of the evidence and the justice of the cause, must be construed in view of the case then before it upon which such judgment was ordered. It is obvious from the opinion that the court found in that case that there was no evidence to support the judgment appealed from, and that appellant, upon the uncontradicted facts, was entitled to judgment in his favor, and judgment was accordingly ordered. We deem the rule under which the case was determined in this court, namely, unless the findings of facts of the trial court are against the clear preponderance of the evidence they cannot be disturbed on appeal to this court, applicable to cases of this nature. The reasons for the rule are well presented in *Ely v. Daily,* 40 Wis. 52; *Snyder v. Wright,* 13 Wis. 689; *Murphy v. Dunning,* 30 Wis. 296; *Johnson v. Goult,* 106 Wis. 247, 82 N. W. 139.

The motion for a rehearing must be denied.

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CITY OF MADISON and others, Respondents, vs. MADISON GAS & ELECTRIC COMPANY and others, Appellants.

May 14—October 9, 1906.

Injunction: Abuse of corporate franchises: By whom action may be brought: Public service corporations: Gas companies: Rates to be reasonable: Fixing rates: Legislative and judicial power.

1. Acts in excess and abuse of corporate franchises and privileges, resulting in private injuries, may be restrained at the suit of private parties.
2. In the absence of legislative restriction of the rate to be charged, the grant of a franchise to conduct the business of furnishing gas to a city and its inhabitants carries with it by implication the obligation to furnish it at a reasonable price.
3. The rates to be charged by a public service corporation may be prescribed by the legislature either directly or by delegation of the power to municipal corporations or other appropriate agencies, provided the rates so fixed are such as to afford a reasonable compensation for the service rendered.
4. Courts cannot prescribe the rates to be charged by public service corporations for future services, but may inquire and determine whether rates fixed by legislative authority are reasonable or unreasonable.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an appeal from an order. The action was commenced by the service of a summons. At the same time there was served an affidavit of plaintiffs' attorney, a notice, under sec. 4096, Stats. 1898, of examination of some of the defendants personally and as officers of the defendant *Madison Gas & Electric Company,* and also a *subpœna duces tecum* requiring the production by the gas company of its books and the records pertaining to its organization, indebtedness, and cost of plant, and generally as to the costs and disbursements incident to the conduct of the business. It is averred that the action is instituted to enjoin the defendant from exacting

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from the plaintiff the city of *Madison* and all its customers, for gas and electricity used by them, unreasonable and excessive rates; and to compel it to furnish such customers, in the future, gas and electricity, of good quality and at reasonable rates, without unjust discriminations. The relief sought is in no way to affect the rates at which gas and electricity are to be furnished the city during the period of the existing contract between it and the gas company.

The facts presented show that the defendant is a corporation organized under the name of the *Madison Gas & Electric Company* (for brevity it will herein be referred to as the gas company); that it is the owner of the rights and privileges granted by the legislature of this state and the common council of the city of *Madison* to conduct the business of supplying gas and electricity to the city of *Madison* and its inhabitants; that it is the only company conducting such a business within the city, and is supplying the city and its inhabitants with these commodities at rates established by it; that no rates have been prescribed under its charter or otherwise by the city or the state; and that it has placed gas pipes, posts, and electric poles and wires within and upon the public streets of the city.

The object of the examination of these parties is to enable plaintiffs to frame their complaint, and to that end discovery is sought, among other things, as to what amount has been actually paid in and invested by the gas company to acquire, build, and maintain its present plant, the amounts, time of payment and when made, in detail; the amount of bonds issued by it, when and by whom purchased, with amounts actually paid by the purchasers, and the disposition of the moneys received for bonds; the actual indebtedness of the company, when, for what, and how contracted; the disposition of moneys realized on loans; its annual operating expenses and annual gross receipts; its schedule of rates charged for the commodities it supplies to its customers; and whether

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it is a member or partner of any combination or trust, and full information of such condition and relation, if it exist.

The defendant obtained an order to show cause why the proceeding before the court commissioner for such examination should not be perpetually stayed and the action dismissed. The facts and circumstances alleged by the defendant for such relief were that the plaintiff the city of *Madison* had no interest in the action; that it has agreed to indemnify the individual plaintiffs (who are the real parties in interest and who are prosecuting the action) for their costs and expenses; and that the undisputed facts and circumstances, upon which plaintiffs rely, furnish no grounds in law for the equitable relief sought to be enforced.

The motion was heard upon the affidavit, notice of examination, *subpœna duces tecum,* served and filed, and the papers and proceedings in the action. Upon a hearing the court entered an order denying the motion of defendants for a stay of any further proceedings for such examination of the parties and for dismissal of the action. This is an appeal from such order.

The cause was first argued on March 26, 1906.

For the appellants there was a brief by *Olin & Butler,* and oral argument by *H. L. Butler.* They argued, among other things, that it affirmatively appears that the plaintiff city cannot maintain the action. It is getting its light under a contract which has about three years to run, and a court of equity will not anticipate that three years hence the gas company will exact an unreasonable contract from the city. An injunction against such a remotely possible and speculative injury is unheard of. 16 Am. & Eng. Ency. of Law (2d ed.) 361. The right of the city to maintain this action, if it exists at all, must rest alone upon the fact alleged in the affidavit that inhabitants of the city who are patrons of the company are being charged an excessive rate for lighting service. These facts can give the city no right to maintain the action

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except upon the theory that it is a proper municipal function to redress in the courts, at municipal expense, the individual wrongs of a certain class of citizens. This theory is condemned by authority as well as by reason. The city is not the real party in interest, because, by reason of the outstanding contract, it cannot, in its corporate entity, receive any benefit, direct or indirect. Sec. 2605, Stats. 1898; *Gross v. Heckert,* 120 Wis. 314, 320. No statute, expressly or by implication, vests in the city the right to maintain such an action; nor is the city in any sense the trustee of an express trust within the meaning of sec. 2607, Stats. 1898. 22 Ency. Pl. & Pr. 169; *Robbins v. Deverill,* 20 Wis. 142; *Boyd v. Mut. F. Asso.* 116 Wis. 155; *Janesville v. Carpenter,* 77 Wis. 288; *State ex rel. Burnham v. Cornwall,* 97 Wis. 565; *Madison v. Mayers,* 97 Wis. 399; 20 Am. & Eng. Ency. of Law (2d ed.) 1145; *Park v. Modern Woodmen,* 181 Ill. 214, 54 N. E. 932; *People ex rel. Jackson v. Suburban R. Co.* 178 Ill. 594, 49 L. R. A. 650, 656; *New Haven v. N. H. & D. R. Co.* 62 Conn. 252, 18 L. R. A. 256; *Kinne v. New Haven,* 32 Conn. 210; *Butler's App.* (Pa.) 6 Atl. 708; *Grand Rapids v. Grand Rapids H. Co.* 66 Mich. 606, 33 N. W. 749; *Coast Co. v. Spring Lake,* 58 N. J. Eq. 586, 51 L. R. A. 657, 663. The city having no right itself to maintain the action, its agreement to indemnify the individual plaintiffs for their costs and expenses in doing so was against public policy and unlawful, and, the action being prosecuted under such unlawful agreement, the right to the examination should have been denied and the action dismissed. *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421, 423; *Barker v. Barker,* 14 Wis. 131; *Kelly v. Kelly,* 86 Wis. 170; *Andrews v. Thayer,* 30 Wis. 228; 5 Am. & Eng. Ency. of Law (2d ed.) 818, 829; *Allard v. Lamirande,* 29 Wis. 502; *Harrington v. Long,* 2 Myl. & K. 590. An actual interest is necessary to relieve the transaction from the taint of maintenance. *Thallhimer v. Brinckerhoff,* 3 Cow. 623, 647; *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421, 433.

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For the respondents there was a brief by *A. C. Hoppman,* city attorney, and *Bird, Gilman & Hobbins,* attorneys, and the cause was argued orally by *G. W. Bird.* They contended, *inter alia,* that the plaintiffs, the city as well as the individuals, all have an interest in the subject of the action and in obtaining the relief demanded, and may be joined as plaintiffs under sec. 2602, Stats. 1898, and they constitute the real parties in interest in whose name sec. 2605 requires the action to be prosecuted. The city and individual plaintiffs are all consumers of gas and electricity furnished by the defendant corporation, which enjoys a monopoly of the business in the city; and the city is one of those who will be entitled to the benefits of the action if successful. 15 Ency. Pl. & Pr. 584–587, 592, note, 594, 668; *Gross v. Heckert,* 120 Wis. 314, 320. The individual plaintiffs are resident taxpayers of the city, and as such may be joined with the city to procure reasonable rates for public lighting, although such joinder may not be necessary. *Willard v. Comstock,* 58 Wis. 565; *Fowler v. Superior,* 85 Wis. 411; *Frederick v. Douglas Co.* 96 Wis. 411; *Nevil v. Clifford,* 55 Wis. 161. To authorize joinder it is not necessary that all the plaintiffs should be affected alike, or as to the same rights; it is sufficient if they have a common right to prevent the mischief complained of. *Barnes v. Racine,* 4 Wis. 454; *Williams v. Smith,* 22 Wis. 594; *Catlin v. Wheeler,* 49 Wis. 507; *Pettibone v. Hamilton,* 40 Wis. 402; *Peck v. School Dist.* 21 Wis. 516. Even if the city were not a consumer of gas and electricity furnished by defendants, it would still have sufficient interest in the matters in controversy to enable it to maintain this action, either as sole plaintiff or joined with individual consumers. *Muncie Nat. Gas Co. v. Muncie,* 160 Ind. 97, 66 N. E. 436; *State ex rel. Bridgeton v. Bridgeton & M. T. Co.* (N. J.) 45 L. R. A. 837, 841; *Fla., C. & P. R. Co. v. State ex rel. Tavares,* 31 Fla. 482, 20 L. R. A. 419. The contract for public lighting, expiring October 1, 1908, does not deprive the city of its interest in the subject matter of the ac-

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tion and in obtaining the relief demanded. The city has the present right to be supplied with gas and electricity by defendants, (1) of good quality and sufficient quantity, (2) at the contract price until October 1, 1908, and (3) at reasonable rates after that date. Because the contract price is being accorded now does not prevent the action to secure the other measures of relief sought. Had immediate reasonable rates for public lighting been sued for in addition to the other relief demanded, plaintiffs could have maintained the action for the latter though not entitled to the former; for it is familiar law that if the plaintiff is entitled to some relief, though not to all asked, he may maintain his action. *Hawley v. Tesch,* 72 Wis. 299; *Stronach v. Stronach,* 20 Wis. 129; *Moritz v. Splitt,* 55 Wis. 441; *Tewksbury v. Schulenberg,* 41 Wis. 584; *Plainfield v. Plainfield,* 67 Wis. 526. All the cases cited by defendants are clearly distinguishable from this case. In neither of them was there any claim or even pretense that the city would receive in its corporate capacity any benefit, or be relieved from any burden, by the relief demanded. All the benefits sought were to inure solely to private individuals, residents of the city. The undertaking of the city to pay the expense of the suit is not champertous, because the common-law doctrine as to maintenance does not apply to persons who either have an interest in the litigation or who act in the *bona fide* belief that they have. Any interest whatever, whether great or small, certain or uncertain, immediate or remote, is sufficient to exempt such persons from the charge of maintenance. 5 Am. & Eng. Ency. of Law (2d ed.) 815–820; 6 Cyc. 865, 866; *Davies v. Stowell,* 78 Wis. 334; *Gilbert-Arnold L. Co. v. O'Hare,* 93 Wis. 194; *Andrews v. Thayer,* 30 Wis. 228; *Chicago City R. Co. v. Gen. E. Co.* 74 Ill. App. 465; *Frost v. Paine,* 12 Me. 111; *Industry v. Starks,* 65 Me. 167; *Williams v. Fowle,* 132 Mass. 385; *Call v. Calef,* 13 Met. 362; *Thallhimer v. Brinckerhoff,* 3 Cow. 623; *Gilleland v. Failing,* 5 Denio, 308; *Lathrop v. Amherst*

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Bank, 9 Met. 489; *Wickham v. Conklin,* 8 Johns. 220; *Gowen v. Nowell,* 1 Me. 292; *Cooley v. Osborne,* 50 Iowa, 526. Nor does it apply to parties to the suit. 5 Am. & Eng. Ency. of Law (2d ed.) 816–819; 6 Cyc. 851 and notes. It is sufficient if the party honestly believes that he has an interest in the question, although it may turn out that he has not. *Findon v. Parker,* 11 Mees. & W. 675; *McCall's Adm'r v. Capehart,* 20 Ala. 521; *Vaughan v. Marable,* 64 Ala. 60; *Gilman v. Jones,* 87 Ala. 691; *Wickham v. Conklin,* 8 Johns. 220.

On April 17, 1906, the court directed a re-argument on the following questions:

1. In the absence of limitations of rates by franchise or contract, must gas be furnished to consumers at reasonable rates?

2. Is it within judicial power to fix such rates for the future?

3. Is equity jurisdiction available for the purpose only of declaring an existing rate to be excessive?

4. If equity jurisdiction is so available, may it be properly invoked on behalf of consumers generally by the city which granted the franchise?

The cause was re-argued on May 14, 1906.

For the appellants there was a brief by *Olin & Butler,* and oral argument by *H. L. Butler* and *J. M. Olin.* They conceded that the authorities appear to hold that the business of supplying light to a municipality, under a grant of the right to use the streets for such purpose, is impressed with a public interest, and hence that the duty arises to furnish service at reasonable rates; yet a contrary view is taken in *Paterson G. L. Co. v. Brady,* 27 N. J. Law, 245; *Comm. v. Lowell G. L. Co.* 12 Allen, 75. See, in connection with these cases, *Evans v. Boston H. Co.* 157 Mass. 37, 40; *Olmsted v. Proprietors,* 47 N. J. Law, 311, 333; *Haugen v. Albina L. & W. Co.* 21 Oreg. 411; *Portland Nat. Gas & Oil Co. v. State*

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ex rel. Keen, 135 Ind. 54, 34 N. E. 818. But in the absence of express legislative authority a municipality has no power to fix or limit rates. *State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23; *Ashland v. Wheeler,* 88 Wis. 607; *Allen v. Clausen,* 114 Wis. 244; *Lewisville Nat. Gas Co. v. State ex rel. Reynolds,* 135 Ind. 49, 21 L. R. A. 734; *St. Louis v. Bell Tel. Co.* 96 Mo. 623, 2 L. R. A. 278; *In re Pryor,* 55 Kan. 724, 29 L. R. A. 398; *Wabaska E. Co. v. Wymore,* 60 Neb. 199, 82 N. W. 626. No such legislative authority exists as to the city of *Madison.* It is not within judicial power to fix rates for the future. The circuit court, under the constitution, is purely a judicial court. It cannot exercise legislative powers. *In re North Milwaukee,* 93 Wis. 616. The fixing of rates is a legislative power. *Interstate Comm. Comm. v. C., N. O. & T. P. R. Co.* 167 U. S. 479, 499. The limit of judicial power is to declare whether the particular rate challenged is unreasonable, not to establish a rate for the future. *Reagan v. Farmers' L. & T. Co.* 154 U. S. 362, 397; *Express Cases,* 117 U. S. 1, 29; *Pullman's P. C. Co. v. Mo. Pac. R. Co.* 115 U. S. 587, 598; *So. Pac. Co. v. Colo. F. & I. Co.* 101 Fed. 779, 785; *Capital City Gas Co. v. Des Moines,* 72 Fed. 818; *People's G. L. & C. Co. v. Hale,* 94 Ill. App. 406; *Nebraska Tel. Co. v. State ex rel. Yeiser,* 55 Neb. 627, 76 N. W. 171; *Lanning v. Osborne,* 76 Fed. 319, 336; *Steenerson v. G. N. R. Co.* 69 Minn. 353, 72 N. W. 713, 716; *State ex rel. Board of T. v. S. C., O. & W. R. Co.* 46 Neb. 682, 31 L. R. A. 47. Equity jurisdiction is not available for the purpose only of declaring an existing rate to be excessive. The machinery of a court of equity cannot be put in motion unless the relief obtainable in the action is of substantial benefit to the complainants. *Ellis v. Southwestern L. Co.* 102 Wis. 409. No such benefit could result merely from a judicial declaration that an existing rate is excessive. It would not be *res adjudicata* of anything in a suit brought a month later attacking the same rate as excess-

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ive. *Wentworth v. Racine Co.* 99 Wis. 26, 31. A decree in general terms restraining the company from charging unreasonable rates or commanding it to furnish gas at reasonable rates would be idle and erroneous. *So. Pac. Co. v. Colo. F. & I. Co.* 101 Fed. 779, 785. The remedy at law is adequate. *Lough v. Outerbridge,* 143 N. Y. 271, 25 L. R. A. 674, 676; 4 Elliott, Railroads, § 1564, and cases cited; *Rice v. D., Y. & A. A. R. Co.* 122 Mich. 667, 48 L. R. A. 84; *Reagan v. Farmers' L. & T. Co.* 154 U. S. 362, 397; *So. Pac. Co. v. Colo. F. & I. Co.* 101 Fed. 779, 786; *Nebraska Tel. Co. v. State ex rel. Yeiser,* 55 Neb. 627, 76 N. W. 171, 173; *Shepard v. Milwaukee G. L. Co.* 6 Wis. 539; *Graham v. C., M. & St. P. R. Co.* 53 Wis. 473. Equitable jurisdiction cannot be justified on the theory that a multiplicity of suits would be prevented. The rights and interests of consumers, as between themselves and the company, are several and independent. If excessive rates are being exacted of any, the wrong is to each consumer individually. Other consumers are in no sense *necessary* parties to any action which plaintiffs may bring to vindicate their alleged rights. Other consumers certainly could rightfully refuse to join in the litigation and would not be bound by the result. *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 508. Nor are several consumers entitled to join in an action in equity to have existing rates declared excessive. *Linden L. Co. v. Milwaukee E. R. & L. Co., supra; Newcomb v. Horton,* 18 Wis. 566; *Barnes v. Beloit,* 19 Wis. 93; *Pier v. Fond du Lac Co.* 53 Wis. 421; *Gilkey v. Merrill,* 67 Wis. 459, 461. See *Nairin v. Ky. H. Co.* (Ky.) 86 S. W. 676.

For the respondents there was a brief by *John A. Aylward,* city attorney, and *Bird, Gilman & Hobbins,* attorneys, and oral argument by *Mr. G. W. Bird* and *Mr. Aylward.* They contended that, in the absence of limitation of rates by franchise or contract, gas must be furnished to consumers at reasonable rates. 14 Am. & Eng. Ency. of Law (2d ed.) 928;

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Lindsley, Rate Regulation, 36; *Allnutt v. Inglis,* 12 East, 527, 538, 540; *Cincinnati, H. & D. R. Co. v. Bowling Green,* 57 Ohio St. 336, 345, 346, 49 N. E. 121, 123, 124; *Munn v. Illinois,* 94 U. S. 113; *Root v. L. I. R. Co.* 114 N. Y. 300, 4 L. R. A. 331; *McDuffee v. P. & R. R. Co.* 52 N. H. 430; *Johnson v. P. & P. R. Co.* 16 Fla. 623; *Chicago, B. & Q. R. Co. v. Iowa,* 94 U. S. 155; *Dow v. Beidelman,* 125 U. S. 680; *Ruggles v. Illinois,* 108 U. S. 526; *Avinger v. S. C. R. Co.* 29 S. C. 265. The common-law rule that corporations engaged in so-called public callings must furnish their services and supplies at reasonable rates is recognized by this court in the following cases: *Shepard v. Milwaukee G. L. Co.* 6 Wis. 539, 547; *Streeter v. C., M. & St. P. R. Co.* 44 Wis. 383; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 588. It is within judicial power to fix reasonable rates for the future. In this case the court is not called upon necessarily to go to the extent of fixing reasonable rates for the future, but may stop short of that and simply declare present rates unreasonable and enjoin their exaction for the future. But while this is so, the second question for re-argument should be answered in the affirmative, both upon reason and authority. It is within judicial power to determine whether a given rate is reasonable, and if found to be unreasonable to enjoin its exaction or enforcement in the future; and this includes the power to establish the maximum of such rates for the future. *Munn v. Illinois,* 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa,* 94 U. S. 155; *Chicago, M. & St. P. R. Co. v. Minnesota,* 134 U. S. 418; *San Diego L. & T. Co. v. National City,* 174 U. S. 739; *Spring Valley W. W. v. San Francisco,* 82 Cal. 286; *Reagan v. Farmers' L. & T. Co.* 154 U. S. 362; *St. Louis & S. F. R. Co. v. Gill,* 156 U. S. 649; *Smyth v. Ames,* 169 U. S. 466; *Chicago & G. T. R. Co. v. Wellman,* 143 U. S. 339; *Peoria G. & E. Co. v. Peoria,* 200 U. S. 48; *Cincinnati, H. & D. R. Co. v. Bowling Green,* 57 Ohio St. 336, 49 N. E. 121; *New Memphis G. & L. Co. v. Memphis,*

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72 Fed. 952. Equitable jurisdiction is available for the purpose only of declaring an existing rate excessive. The power to declare an existing rate excessive is of the same nature as the power to declare an existing rate unreasonably low. In the exercise of each the main question is, What is a reasonable rate? That being settled, the given rate is excessive if it exceeds that rate, and unreasonably low if it falls below it. All the cases before cited agree that, if the given rate is unreasonably low, equity jurisdiction is available to have it so declared at the suit of the corporation; and there seems to be no just reason why the courts should not be equally open to the people for like redress where the given rate fixed by the company is excessive. *Cincinnati, H. & D. R. Co. v. Bowling Green,* 57 Ohio St. 336, 49 N. E. 121, 123; *Chicago, B. & Q. R. Co. v. Iowa,* 94 U. S. 155; *Dow v. Beidelman,* 125 U. S. 680; *Reagan v. Farmers' L. & T. Co.* 154 U. S. 362; *Smyth v. Ames,* 169 U. S. 466; *New Memphis G. L. Co. v. Memphis,* 72 Fed. 952; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *Portland Nat. Gas & Oil Co. v. State ex rel. Keen,* 135 Ind. 54, 34 N. E. 818; *Greenfield Gas Co. v. Trees,* 165 Ind. 209, 75 N. E. 2; *Coy v. Indianapolis Gas Co.* 146 Ind. 655, 46 N. E. 17; *State ex rel. Snyder v. Portland Gas & Oil Co.* 153 Ind. 483, 53 N. E. 1089; *Gibbs v. Con. Gas Co.* 130 U. S. 396; *Gas Light Co. v. Zanesville,* 47 Ohio St. 35, 23 N. E. 60; *Zanesville v. Gas Light Co.* 47 Ohio St. 1, 23 N. E. 55; *Tacoma H. Co. v. Tacoma L. & W. Co.* 3 Wash. 316, 28 Pac. 516; *Louisville Gas Co. v. Dulaney,* 100 Ky. 405; *Baily v. Fayette G. F. Co.* 193 Pa. St. 175; *People's G. L. & C. Co. v. Hale,* 94 Ill. App. 406. Equity jurisdiction may be properly invoked on behalf of consumers generally by the city which granted the franchise. *Muncie Nat. Gas Co. v. Muncie,* 160 Ind. 97, 66 N. E. 436; *Gas Light Co. v. Zanesville,* 47 Ohio St. 35, 23 N. E. 60; *State ex rel. Bridgeton v. Bridgeton & M. T. Co.* (N. J.) 45 L. R. A. 837; *Fla., C. & P. R. Co. v. State ex rel. Tavares,* 31 Fla. 482, 20 L. R. A.

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419; *Watertown v. Cowen,* 5 Paige, 510; *Williams v. Smith,* 22 Wis. 594; *State ex rel. Wilbur v. Trenton P. R. Co.* 57 N. J. Law, 212; *Greenfield Gas Co. v. Trees,* 165 Ind. 209, 75 N. E. 2. The doctrine that municipalities may maintain actions to restrain unlawful interference with its streets, recognized and enforced by this court, is sufficient to enable the city to maintain this action, even if it were not a consumer of gas and electricity. *Pewaukee v. Savage,* 103 Wis. 271; *Neshkoro v. Nest,* 85 Wis. 126; *Waukesha H. M. Co. v. Waukesha,* 83 Wis. 475; *Oshkosh v. M. & L. W. R. Co.* 74 Wis. 534; *Jamestown v. C., B. & N. R. Co.* 69 Wis. 648.

The following opinion was filed June 21, 1906:

Siebecker, J. The nature and the purpose of this action must be determined from the facts shown in the affidavit filed, under sec. 4096, Stats. 1898, in the proceeding for the examination of the parties before trial. This examination is demanded for the purpose of enabling plaintiffs to frame their complaint. The affidavit states the general nature and objects of the action as well as the points upon which discovery is desired. It appears that the action is planted in equity, and is one seeking to enjoin the gas company and its officers and agents from demanding or exacting from its customers unreasonable and excessive rates for gas to be furnished to them, and to compel it to furnish a good quality and a sufficient quantity of its commodities at reasonable rates, without unjust discrimination, and to establish a uniform schedule of prices for them. There is no dispute as to the nature of the business conducted by the gas company, and there is no dispute but that it has acquired rights and privileges to conduct the business of furnishing gas and electricity to the city of *Madison* and its inhabitants, and that it may, for this purpose, occupy the streets and alleys of the city with pipes and poles, electric wires, and such other appliances as

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are appropriate and necessary for the maintenance and conduct of its enterprise.

From the nature and object of the action and the relief demanded it is obvious that plaintiffs are prosecuting it as one in equity to restrain the gas company from continuing to furnish these commodities to its customers at the prices it has charged and is now charging for them, upon the ground that such charges are unreasonably high and are unauthorized by the franchise it exercises, and result in an excess and abuse of the rights and privileges granted it, under which it devoted its property to a use in which the public have an interest.

The right to relief by injunction, to restrain acts in excess and abuse of corporate franchises and privileges, is recognized in the law and has been enforced by the courts of this state in appropriate cases. The presentation of the grounds of this jurisdiction contained in the opinion in *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, is so complete and sufficient that nothing additional can now be said on the subject. The remedy was therein applied in an action by the attorney general, acting for the state, to restrain the railroad companies from exacting tolls for the carriage of passengers and freight in excess of the maximum rates established by acts of the legislature. It is there stated:

"The equitable jurisdiction precludes the objection that there is an adequate remedy at law. It admits the remedy at law, but administers its own remedy in preference, when the state seeks it in preference. It seems to proceed on the presumption that it may better serve the public interest to restrain a corporation, than to punish it by penal remedies or to forfeit its charter, and that, in that view, the proper officers of the state should have an election of remedies." Page 524.

The following cases are cited in addition to those cited by the court in its opinion: *Comm. v. P. & C. R. Co.* 24 Pa. St. 159; *Att'y Gen. v. Jamaica Pond A. Corp.* 133 Mass. 361; *Stockton v. Cent. R. Co.* 50 N. J. Eq. 52, 24 Atl. 964; 5 Pom.

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Eq. Jur. (Eq. Rem.) § 302, and cases cited in notes. The court also asserts that "the custom of courts of equity to interfere in such cases, at the suit of private parties, for private injuries, is quite old," and that "it seems to have grown up out of the ancient jurisdiction to restrain waste and nuisance," and declares that the jurisdiction in favor of both the public and private persons is well established, "one on behalf of the state, for public wrong, and the other on behalf of private persons, for private wrong, arising from an excess or abuse of corporate franchises." 35 Wis. 528, 529. The equitable jurisdiction "of private suits to restrain private wrongs arising from" such excess or abuse of corporate powers, which was then recognized as firmly established by both the English and American cases, has been so extensively applied that it cannot now be regarded as open to question.

Among specific applications of the jurisdiction to cases pertaining to acts of corporations engaged in the business of furnishing gas and electricity to a city and its inhabitants are the following: *Gas Light Co. v. Zanesville,* 47 Ohio St. 35, 23 N. E. 60. This was an action by the city, in its proprietary capacity, to enforce its right to have gas furnished by the gas company in compliance with the terms of an ordinance prescribing fixed rates. The case of *Muncie Nat. Gas Co. v. Muncie,* 160 Ind. 97, 66 N. E. 436, was an action in equity by the city against the gas company to enforce obedience to an ordinance prescribing the rates and the conditions upon which gas was to be furnished to the inhabitants of the city. In *Louisville Gas Co. v. Dulaney,* 100 Ky. 405, 38 S. W. 703, equitable relief by injunction was awarded to prevent a threatened violation of franchise obligations by way of overcharges for gas. Among other cases wherein equity has exercised jurisdiction in similar cases to restrain corporations from committing acts, resulting in private injury, in excess or violation of franchise rights and obligations, are the following: *Seattle G. & E. Co. v. Citizens' L. & P. Co.* 123 Fed.

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588; *People's Gas Co. v. Tyner,* 131 Ind. 277, 31 N. E. 59; *Hudson River Tel. Co. v. Watervliet T. & R. Co.* 135 N. Y. 393, 32 N. E. 148; *Pennsylvania R. Co.'s App.* 115 Pa. St. 514, 5 Atl. 872; *Shamokin v. Shamokin & Mt. C. E. R. Co.* 196 Pa. St. 166, 46 Atl. 382; *Ernst v. New Orleans W. W. Co.* 39 La. Ann. 550, 2 South. 415; 5 Pom. Eq. Jur. (Eq. Rem.) §§ 301–304; *Coast Co. v. Spring Lake,* 58 N. J. Eq. 586, 47 Atl. 1131, 51 L. R. A. 657, and note; *Bienville W. S. Co. v. Mobile,* 112 Ala. 260, 20 South. 742; *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.* 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893; *Sickles v. Manhattan G. Co.* 64 How. Pr. 33. In the following cases this equitable remedy was employed by the courts of this state upon analogous grounds: *Jamestown v. C., B. & N. R. Co.* 69 Wis. 648, 34 N. W. 728; *Oshkosh v. M. & L. W. R. Co.* 74 Wis. 534, 43 N. W. 489.

The defendants aver that it is not within the power of the court to remedy the wrongs complained of through its equitable jurisdiction, and therefore ask for the dismissal of the case. As before stated, plaintiffs seek preventive relief against acts of the gas company, alleged to constitute an excess and abuse of the privileges and franchises granted for conducting its business of furnishing gas and electricity to the city of *Madison* and its inhabitants. The business of supplying gas and electricity to meet the demands of the inhabitants of a community, under grant of the state or of a municipal corporation, is of a public nature. It is, in character, a public business and like that of common carriers, warehousemen, and other enterprises in which the community has an interest different from what it has in private enterprises devoted to manufacturing and merchandising the common articles of trade. This view was expressed by this court in the early case of *Shepard v. Milwaukee G. L. Co.* 6 Wis. 539, which is well supported by the decisions of various courts. *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 9 Sup. Ct. 553; *New Or-*

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leans Gas Co. v. Louisiana L. Co. 115 U. S. 650, 6 Sup. Ct. 252. In *Louisville Gas Co. v. Citizens' Gas Co.* 115 U. S. 683, 6 Sup. Ct. 265, it is said:

"Such a business is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas lights. The former articles may be supplied by individual effort, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and sale. But as the distribution of gas in thickly populated districts is, for the reasons stated in the other case, a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as, under the constitution of Kentucky, authorized the legislature to grant to the defendant the exclusive privilege in question." *St. Louis v. St. Louis G. Co.* 70 Mo. 69; *Chicago G. & C. Co. v. People's G. & C. Co.* 121 Ill. 530, 13 N. E. 169; 20 Cyc., Gas, 1154 *et seq.*

The right to regulate these enterprises and the property employed in them rests upon grounds which are exhaustively examined and fully elaborated in *Munn v. Illinois,* 94 U. S. 113, and the views therein expressed have been accepted by the courts of this country whenever they have been called upon to pass on the question. It is there stated that, when we look to the common law for the right of the state to regulate these public undertakings, it is found

"that, when private property is affected with a public interest, it ceases to be *juris privati* only." "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, as long as he maintains the use, he must submit to the control."

Att'y Gen. v. Railroad Cos. 35 Wis. 425.

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The right to conduct such a business under grant from a municipality in no way affects its character, and such a grant is deemed to be one from the state through one of its municipal agencies. *New Orleans v. Clark,* 95 U. S. 644, and cases cited; *Hamilton G. & C. Co. v. Hamilton,* 146 U. S. 258, 13 Sup. Ct. 90; *Wright v. Nagle,* 101 U. S. 791.

One of the conditions for the exercise of the privilege of conducting a gas business, under legislative grant, is that, in the absence of legislative prescription restricting the rate of compensation for the service furnished, the grant carries by implication the obligation to furnish it at a reasonable price. Such obligation is implied by law and is incurred by acceptance of the franchise and privilege. This is the declared rule of law as established by the adjudications. See the following cases in support of the rule: *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *Shepard v. Milwaukee G. L. Co.* 6 Wis. 539; *Capital City G. Co. v. Des Moines,* 72 Fed. 829; *Spring Valley W. W. v. Schottler,* 110 U. S. 347, 4 Sup. Ct. 48; *Dow v. Beidelman,* 125 U. S. 680, 8 Sup. Ct. 1028; *Chicago, M. & St. P. R. Co. v. Minnesota,* 134 U. S. 418, 10 Sup. Ct. 462; *Smyth v. Ames,* 169 U. S. 466, 18 Sup. Ct. 418; *Cotting v. Kansas City S. Y. Co.* 183 U. S. 79, 22 Sup. Ct. 30; *Lumbard v. Stearns,* 4 Cush. 60; *People v. Budd,* 117 N. Y. 1, 22 N. E. 670, 682; *Clark v. State,* 142 N. Y. 101, 36 N. E. 817. Within this principle, so established, rests the right of the state to prescribe the charge to be made for a public service, if, under the facts and circumstances, it be a sum sufficient to afford a reasonable compensation.

This power of the state is in its nature legislative, and has always been exercised either directly by the legislative branch of the government or by delegation of it to municipal corporations or some other appropriate agency. Whether existing or prescribed rates and charges for a public service afford a reasonable compensation is a judicial question. In the very nature of the right to regulate these matters between the pub-

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lic and those engaged in performing the service, it must follow that courts cannot prescribe a schedule of rates and charges as the prescribed *quantum* of compensation which is to be awarded for future services, because it is the legislative prerogative to make and prescribe the rules which shall regulate the relations between persons and their acts as they arise in the affairs of life. When, however, such rules have been enacted as law, then the judiciary is vested with the authority to construe and apply them to the affairs they were intended to regulate and control. These two functions are recognized as distinct and separate in the fundamental organization of our government, and the prerogatives and powers of the one department of government are not to be encroached upon or curtailed by the other. In *Reagan v. Farmers' L. & T. Co.* 154 U. S. 362, 14 Sup. Ct. 1047, the court, in speaking of the power to fix the compensation for a public service, says:

"The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what under all the circumstances would be fair and reasonable as between the carrier and the shipper. They do not engage in any mere administrative work. But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

In the *Express Cases,* 117 U. S. 1, 6 Sup. Ct. 542, wherein the trial court had fixed and regulated the terms and prescribed what it deemed reasonable charges upon which the railroad and express companies should do their public business, it was held:

"In this way, as it seems to us, 'the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought to have made for themselves.' The regulation of matters of this kind is legislative in its character, not judicial."

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And in *Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co.* 110 U. S. 667, 682, 4 Sup. Ct. 192, it is observed:

"A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation."

These and other cases serve to define the limits of the judicial power in dealing with the subject of enforcing the obligation as to reasonable compensation for the performance of a public service like those involved in this action. The decisions upon the subject make it obvious that the power to prescribe what the charges shall be for services rendered in the conduct of a business impressed with a public interest is vested in the legislature, and must be exercised by it directly or through some appropriate agency. *Winchester & L. T. R. Co. v. Croxton,* 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177, and cases cited in editor's note; *Ruggles v. People,* 91 Ill. 256; *Sternberg v. State,* 36 Neb. 307, 54 N. W. 553; *Olmsted v. Proprietors,* 47 N. J. Law, 311; *Cincinnati, H. & D. R. Co. v. Bowling Green,* 57 Ohio St. 336, 49 N. E. 121; *Smyth v. Ames,* 169 U. S. 466, 18 Sup. Ct. 418; *Nebraska Tel. Co. v. State,* 55 Neb. 627, 76 N. W. 171; *W. U. Tel. Co. v. Myatt,* 98 Fed. 335; *So. Pac. Co. v. Colo. F. & I. Co.* 101 Fed. 779, 42 C. C. A. 12. The validity of such legislation may become a question of judicial inquiry if it fails to provide reasonable compensation for the use of the property devoted to such public purpose. If rates are prescribed which are too low to compensate for the service rendered, an enforcement of them would result in taking property employed in the business for a public use without just compensation. The propriety of such legislation must be judicially determined under the constitutional guarantees that "the property of no person shall be taken for public use without just compensation" and that no one shall be deprived of his property without due process of law. *Stone v. Farmers' L. & T. Co.* 116

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U. S. 307, 6 Sup. Ct. 334, 388, 1191; *Chicago, M. & St. P. R. Co. v. Minnesota,* 134 U. S. 418, 10 Sup. Ct. 462, and other cases cited therein.

But it is insisted by respondents that, since the gas company is obligated to furnish gas to the city and its inhabitants at a reasonable price, the court has jurisdiction to determine what, under the existing facts and circumstances, is a reasonable charge, and to enforce it as the measure of future service under like conditions. No doubt the court can ascertain, within its judicial function and whenever the question is necessarily involved in any controversy to which the gas company is a party, what is a reasonable charge for gas furnished. This, however, as already shown, is the extent to which the court can go. Whatever might be determined to be a reasonable charge, under the facts and circumstances adduced in such an inquiry, cannot be enforced as a fixed charge for the service for any purpose other than to determine the particular controversy between the parties and their privies. If it were attempted to enforce it as a prescribed future charge, it would, in an indirect way, usurp the legislative prerogative of prescribing by rule the compensation for a future public service. This, as we have seen, the courts cannot do.

This question arose directly in the case of the *Interstate Comm. Comm. v. C., N. O. & T. P. R. Co.* 167 U. S. 479, 499, 17 Sup. Ct. 900, wherein the commission had determined what were reasonable rates for transportation charges upon railroads between certain fixed points, and had applied to the court for their future enforcement. It is there observed: "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act;" and the court cites cases in support of the doctrine, and concludes (167 U. S. 511, 17 Sup. Ct. 905) that, since Congress had not conferred the legislative power of prescribing

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rates on the commission, "it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, . . . and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just."

These principles are applicable to the case before us, and must be held to rule it. Nothing has been done by the state, either directly, or indirectly through the city of *Madison* as one of its agencies, to prescribe a rate at which the gas company is to furnish gas to the city and its inhabitants. True, the gas company is obligated to furnish the commodity at a reasonable rate, but no power exists in the court to prescribe as a fixed charge for such service in the future what it may find to have been a reasonable rate for the service theretofore furnished. The relief demanded, compelling the gas company to furnish gas to its customers at a reasonable rate in the future, must be secured, either directly or through an appropriate agency, by legislative action, prescribing rates or charges which shall be reasonable for the service. We discover no other object in this action, nor do the facts presented, upon which equitable relief is sought, afford any basis for any other equitable relief to remedy the wrongs complained of. Upon these considerations it must follow that the court erred in denying defendants' motion for dismissal of the action.

By the Court.—The order appealed from is reversed, and the cause remanded with directions that the court enter an order dismissing the action and granting costs to the defendants.

A motion for a rehearing was denied October 9, 1906.

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Roedler, Respondent, vs. Chicago, Milwaukee & St. Paul Railway Company, Appellant.

September 11—October 9, 1906.

(1, 5) *Appeal: Special verdict, when disturbed: Exceptions, when considered: Briefs.* (2–4) *Railroads: Injury to person at street crossing: Failure to give signals: Positive and negative testimony: Contributory negligence: Court and jury.* (6, 7) *Instructions to jury: "Ordinary care:" "Proximate cause."*

1. Although findings in a special verdict may be against a clear preponderance of the evidence, they will not be disturbed on appeal if the evidence, considered in the light most favorable to the successful party which it will legitimately bear, is sufficient to sustain them.
2. In an action against a railway company by one who was struck and injured at night by a train at a street crossing, plaintiff's testimony was to the effect that when approaching the track she listened for a train, and that no whistle was blown or bell rung. Defendant's witnesses testified that the signals were given. The court charged the jury generally that "the positive testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses equally credible who testify negatively or to collateral circumstances merely persuasive in their character from which a negative may be inferred." *Held*, that it was not error to refuse a specific instruction that plaintiff's testimony as to the bell and whistle was negative and not entitled to the same weight as that of defendant's witnesses.
3. When the facts in a case, though undisputed, are ambiguous and of such a nature that reasonable men, unaffected by bias or prejudice, may disagree as to the inference or conclusion to be drawn from them, the case should be submitted to the jury.
4. Whether in this case the plaintiff, who was struck at night by a train at a street crossing, was guilty of contributory negligence in failing to see the headlight of the train as it approached, is *held*, upon the evidence, to have been a question for the jury.
5. Exceptions merely enumerated in an appellant's brief, but not deemed worthy of specific consideration by counsel, will not be considered.
6. A charge to the jury defining ordinary care as being such care as a person of ordinary care and prudence ordinarily *would*

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have exercised under the same or similar circumstances, is not erroneous by reason of the use of the word "would."

7. A charge that by the term "proximate cause" is meant "the *efficient* cause which produces the injury as a natural and probable result," etc., is not erroneous by reason of a failure to add, after the words "efficient cause," the words "that which acts first."

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries sustained by the plaintiff on the evening of January 31, 1903, by being struck by the defendant's train while on the sidewalk on the north side of Western avenue and while crossing or about to cross the defendant's railway track. The complaint is in the usual form in such cases, alleging the giving of the requisite notice January 29, 1904. The defendant answered by way of admissions and denials.

At the close of the trial the jury returned a special verdict to the effect (1) that the plaintiff, at the time and place alleged, was injured by being struck by defendant's train while on the sidewalk on the north side of Western avenue and while crossing or about to cross the railway track; (2) that the bell on the locomotive was not rung before and while the locomotive was passing over the crossing; (3) that the whistle on the locomotive was not blown at or near the Bowen factory; (4) that the defendant's servants (under the existing circumstances) did not use ordinary care towards the public in handling and running the train while it was approaching and passing over the crossing at the time and place in question; (5) that such want of ordinary care on the part of the defendant was the proximate cause of plaintiff's injury; (6) that no want of ordinary care on the part of the plaintiff contributed to produce her injury; (7) that $927 will compensate the plaintiff for the injuries which she received. From the judgment entered thereon in favor of the plaintiff and against the defendant for the amount stated and costs the defendant appeals.

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The appellant's counsel states as undisputed facts in the case that at the time of respondent's injury Western avenue in the city of Fond du Lac ran in an easterly and westerly direction, and appellant's track crossed the same at grade in a northerly and southerly direction. About thirty-six and one-half feet west of appellant's track was a bridge about sixty feet long, which carried Western avenue over Fond du Lac river. At the east end of the bridge and on the north side of Western avenue there was a sidewalk running in a north-easterly direction; it then turned and ran in an easterly direction thirty-six and one-half feet to the west rail of appellant's track. About 400 feet south of the crossing there was a factory building called the Bowen factory, and about thirty-five feet west of the track and south of the crossing were some willow trees. There were no other obstructions to the view south of the crossing, except some telephone poles standing far apart. The respondent at the time of her injury was fifty years of age and had lived on Western avenue, about two blocks from appellant's track, for about twenty years.

For the appellant there was a brief by *Phelps & Watson* and *H. H. Field,* attorneys, and *C. H. Van Alstine,* of counsel, and oral argument by *Mr. Van Alstine.*

For the respondent there was a brief by *Reilly, Fellenz & Reilly,* attorneys, and *Maurice McKenna,* of counsel, and oral argument by *M. K. Reilly.*

Cassoday, C. J. 1. The complaint alleges that the defendant negligently and carelessly omitted, while its train of cars was approaching and crossing Western avenue at a high and dangerous rate of speed, to ring the bell and blow the whistle as required by the statutes. Secs. 1809, 4392, Stats. 1898. The court charged the jury to the effect that the burden was on the plaintiff to establish such want of ordinary care by a preponderance of the evidence; and then charged them that there was no evidence in the case from which it could be in-

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ferred that the train was being run over the crossing faster than six miles an hour. We must assume, for the purposes of this appeal, that there was no excessive speed of the train. As indicated in the foregoing statement, the jury found that the bell was not so rung nor the whistle so blown. Counsel contend that such findings are against the clear preponderance of the evidence. That seems to be so; but the question here presented is whether there is evidence sufficient to sustain such findings when considered in the most favorable light for the plaintiff it will legitimately bear. *Adams v. C. & N. W. R. Co.* 89 Wis. 645, 649, 62 N. W. 525, and cases there cited; *Bading v. Milwaukee E. R. & L. Co.* 105 Wis. 480, 81 N. W. 861; *Renne v. U. S. L. Co.* 107 Wis. 305, 320, 83 N. W. 473, and cases there cited; *Suckow v. State,* 122 Wis. 156, 160, 99 N. W. 440.

The plaintiff testified to the effect that on the evening in question she knew the defendant's railway track was near the bridge on Western avenue; that when she reached the middle of the bridge she listened for the train but heard nothing; that after reaching the east end of the bridge and then going north on the sidewalk to the point where the sidewalk turned to the east, which point is described by other witnesses as being thirty-six and one-half feet from the track, and after walking east a little way on that sidewalk, just how far she could not say, she listened a second time for the train but "heard no whistle blown nor any bell ringing;" and that her hearing was as good as that of other people. At the time the train passed northerly over Western avenue the plaintiff's witness, Wegner, was on that avenue and about 100 or 125 feet east of the train traveling toward the train, and he testified to the effect that he saw the train coming; that it passed over the avenue while he was going west on the avenue; that he first saw the headlight, then the train; that the headlight was very dim and the night very dark; that the bell was not rung at any time from the time he saw the headlight till it passed, nor while

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walking toward the track, and no whistle was blown; and that as he was crossing the track he heard the plaintiff moan on the west side of the railroad track. It is claimed on the part of the defendant that such testimony of the plaintiff in respect to ringing the bell and blowing the whistle was negative and not entitled to the same weight as the testimony of the defendant's witnesses on the subject; and the court was requested to charge the jury accordingly. After charging the jury that they were "the sole judges as to the credibility of witnesses," the court charged the jury:

"The positive testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses equally credible who testify negatively or to collateral circumstances merely persuasive in their character from which a negative may be inferred."

The law on the subject has frequently been discussed by this court and need not be here reiterated. *Joannes v. Millerd,* 90 Wis. 68, 70, 71, 62 N. W. 916; *Steinhofel v. C., M. & St. P. R. Co.* 92 Wis. 123, 129, 65 N. W. 852; *Alft v. Clintonville,* 126 Wis. 334, 338, 339, 105 N. W. 561, and cases there cited. As said in the opinion and held by the court in one of these cases:

"Whether the testimony of witnesses whose attention was called to the noise of the train, and who were listening to it, that they did not hear a signal, is 'merely negative testimony' or 'a mere scintilla of evidence,' may be doubted." 92 Wis. 123, 129, 65 N. W. 852, 853.

We cannot say that there was error in submitting such questions to the jury nor in refusing further instruction upon the subject.

2. Error is assigned because the court refused to direct a verdict in favor of the defendant on the ground of the plaintiff's contributory negligence. This is based upon the fact, which seems to be undisputed, that the headlight was burning. Since this is so, it is claimed that there was a want of ordinary care on the part of the plaintiff in failing to see the head-

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light before passing onto or near the track. This is the vital question in the case and is not free from difficulty. In deciding it the situation and circumstances should be appreciated and the viewpoint of the several witnesses considered. The injury occurred soon after 8 o'clock in the evening, at a time when it was very dark, and there were no street lights in the vicinity except an arc light 286 feet east of the track. At the place in question the defendant's track ran in a northeasterly and southwesterly direction and crossed Western avenue, which ran in an east and west direction. The width of that avenue between the sidewalks was fifty feet. About thirty-six and one-half feet west of the defendant's west rail was the east end of a bridge about sixty feet long which carried Western avenue over the Fond du Lac river. At the east end of that bridge and on the north side of that avenue there was a sidewalk running in a northeasterly direction and parallel with the railway track for a distance of eighteen feet. It then turned and ran directly east to the railway track, a distance of thirty-six and one-half feet. That sidewalk was about five feet wide, and the curb between that sidewalk and the street was about ten feet wide. In that curb were three posts, one fourteen inches in diameter near that sidewalk and twenty-nine feet west of the west rail, another (the sign-post) fourteen feet west of that rail and about the middle of that curb, and another on the curb line fourteen and one-half feet west of that rail. There was another post inside the curb on the south side of that avenue and thirty-nine feet west of the rail. About sixty feet south of the north sidewalk over the bridge and about thirty-five feet west of the track were some willow trees. Four of the witnesses who were either on the bridge or west of it testified that they saw the headlight or the lighted train when it was at or near the Bowen factory. Another witness was on the sidewalk on the south side of that avenue and on a line with Oak street and testified that he first saw the train coming

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around Bowen's plant when he was west of the bridge walking east on the south sidewalk of the avenue, and that when the train passed over the avenue he was eight or ten feet from the track. Another witness who saw the headlight was on the fence on the east side of the track, and he got down and boarded the baggage car as it passed over that avenue. The plaintiff's witness (Wegner) was east of the track and going toward it and saw the headlight, very dim, and then the train, ahead of him; it was very dark, and he could not tell how near he was to the train when it passed, but thought it was about 100 or 125 feet from him. The situation indicates that the train was coming partially toward him. It will be observed that the viewpoint of none of the witnesses was the same or similar to that of the plaintiff. She testified to the effect that she knew the track of the defendant across that avenue was there near the bridge; that when she came onto the bridge from the west, feeling of the railing, she knew there was a railroad there, and when she was about the middle of the bridge on the north sidewalk, as she thought, she looked and listened and heard nothing, looked south and neither heard anything nor saw anything; that in passing over the bridge her back was partially toward the coming train if it was then in sight; that when she reached the east end of the bridge she turned and followed the sidewalk in a northeasterly direction and parallel with the railway track for a distance of eighteen feet, and while passing over that part of the sidewalk her back was directly toward the coming train; that she then turned and followed the sidewalk, which from that point to the track was thirty-six and one-half feet in length; that while passing over the same her back was partly toward the coming train, and while walking thereon she looked and listened a second time; that she could not say about how far she was from the railway track when she looked a second time, because it was so dark and there was no light burning; that when she so looked a second time she looked to the south and

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listened but heard nothing and saw no headlight; that she walked real slow because it was so dark; that she could see and hear as well as other people; that when she looked and listened a second time she may have stopped just a moment to look over, but as to that she could not say exactly; that she knew there was a track around that way, but it was so dark she could not see anything; could not say how far away from the track she was when she looked the second time, but that it was not very long until she was struck.

It appears from the diagram in evidence that the willow trees mentioned could not have obstructed the plaintiff's vision in the direction of the train, unless it was while she was on the bridge or the eighteen-foot strip of sidewalk mentioned, and there is no claim that she looked a second time until after she had passed onto the strip of sidewalk thirty-six and one-half feet long, mentioned, and while on that part of the sidewalk neither the willow trees, nor the post south of the avenue, mentioned, could have prevented her from seeing the headlight, unless while it was 200 or 300 feet southwesterly from the avenue. If there was anything to obstruct her vision from seeing the headlight at any time while she was on that strip of sidewalk, it must have been one or more of the three posts on the curb and near that sidewalk, one of which was twenty-nine feet from the track and the other two fourteen feet and fourteen and one-half feet respectively. As indicated, while on that part of the sidewalk her back was partly toward the train coming from the southwest.

There is no evidence that the plaintiff knew the exact direction from which the train would approach the avenue. She repeatedly testified that when she looked she looked to the south. If she looked directly to the south, then she looked across the track and down Oak street, east of the railway track. Neither the engineer nor the fireman on the train saw the plaintiff when she was struck nor before, notwithstanding they could see the track ahead of the train by reason of the

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headlight. None of the witnesses saw the plaintiff when she was struck nor before, unless it was two of the witnesses who testified that between the place where they were on the bridge and the railway track they observed a dark object on the sidewalk, but could not say whether it was moving or standing.

The question recurs whether upon the evidence, thus outlined, error was committed by refusing to direct a verdict in favor of the defendant by reason of the failure of the plaintiff to observe the headlight. Of course, it is well settled that, except when contributory negligence is disclosed by the testimony on the part of the plaintiff, it is purely a matter of defense, and the burden of proving it is upon the defendant. *Hoye v. C. & N. W. R. Co.* 67 Wis. 1, 15, 29 N. W. 646, and cases there cited; *Thoresen v. La Crosse City R. Co.* 94 Wis. 129, 133, 68 N. W. 548; *Owen v. Portage Tel. Co.* 126 Wis. 412, 416, 105 N. W. 924. Here it is claimed that contributory negligence was disclosed by the evidence on the part of the plaintiff. What constitutes negligence is, generally, a question of fact for the jury. This is especially so when the standard of duty is a shifting one. As this court has, in effect, frequently declared, when the facts and circumstances in a given case, though undisputed, are ambiguous and of such a nature that reasonable men, unaffected by bias or prejudice, may disagree as to the inference or conclusion to be drawn from them, then the case should be submitted to the jury. *Tiborsky v. C., M. & St. P. R. Co.* 124 Wis. 243, 246, 247, 102 N. W. 549, and cases there cited. With some hesitancy we have reached the conclusion that this is such a case. The result is that we cannot hold, as a matter of law, that the plaintiff was guilty of contributory negligence.

3. Error is assigned because the court refused to set aside the verdict and grant a new trial. Under this head twenty-two exceptions are stated in addition to those involved in the questions already considered, and they consist merely in referring to the pages of the record where such exceptions may

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be found. No grounds are stated, no propositions argued, and no principles of law discussed. Obviously, such enumeration of exceptions is not what is contemplated by the rules of this court as to what a brief should contain. Mere exceptions, not deemed worthy of specific consideration by counsel, cannot be expected to receive consideration from this court.

4. On the oral argument our attention was called to certain portions of the charge wherein the jury were told:

"By the term 'ordinary care' as used in the fourth question is meant such care as a person of ordinary care and prudence ordinarily *would* have exercised under circumstances the same as or similar to those disclosed by the testimony in this case."

And again:

"If you believe from the evidence that the trainmen in the running of the train at the crossing used such care to protect the public as persons of ordinary intelligence and prudence ordinarily *would* have used under the same or similar circumstances, your answer to this question should be 'Yes.' "

The criticism is to the use of the word "would." Such use seems to have been expressly sanctioned by this court. *Hanlon v. Milwaukee E. R. & L. Co.* 118 Wis. 210, 223, 95 N. W. 100.

5. So we perceive no error in charging the jury: "By the term 'proximate cause' as used in this question is meant the *efficient* cause, which produces the injury as a natural and probable result," etc. The criticism is that after the words "efficient cause" there should have been added "that which acts first." There seems to be no good reason for the criticism.

By the Court.—The judgment of the circuit court is affirmed.

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LEWIS, Respondent, vs. PRIEST and another, Appellants.

September 11—October 9, 1906.

Mortgages: Foreclosure sale: Confirmation: Inadequacy of price: Fraud.

An order confirming the sale of land upon foreclosure of a mortgage is *held* warranted by the proofs, as against the claim of the mortgagors that the price was grossly inadequate and that by false representations they were induced not to attempt to procure the attendance of bidders.

APPEAL from an order of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

For the appellants the cause was submitted on the brief of *J. M. Gooding.*

For the respondent there was a brief by *Williams, Griswold & Chadbourne,* and the cause was argued orally by *W. A. Griswold.*

WINSLOW, J. A detailed statement of the facts of the case is neither necessary nor desirable. The appeal is taken from an order confirming the sale of mortgaged premises upon foreclosure. The appellants, who were the mortgagors, opposed the motion for confirmation of the sale on the ground of gross inadequacy of price, and on the further ground that they were induced not to attempt to procure the attendance of bidders at the sale by certain false representations made to them by the respondent, among which was the representation that he had a purchaser secured who would bid a considerably larger sum than the sum for which the land was finally sold. Affidavits tending to show these facts were submitted by the appellants, and counter affidavits were submitted by the respondent fully meeting all the charges of fraud and inadequacy of consideration. Upon the proofs thus submitted

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the trial court decided the issue in favor of the respondent and confirmed the sale. We cannot say that this decision was unwarranted by the proofs; in fact we are inclined to come to the same conclusion.

By the Court.—Order affirmed.

BRUGER, Respondent, vs. PRINCETON & ST. MARIE MUTUAL FIRE INSURANCE COMPANY, Appellant.

September 11—October 9, 1906.

(1) *Trial: Legal and equitable issues.* (2) *Evidence: Admissions: Conclusiveness.* (6) *Verified copies, when receivable.* (3, 5–7) *Insurance against fire: Notice of other insurance: Amount of recovery: Instructions to jury: Evidence of value: Policy inconsistent with by-laws of insurer.*

1. Where in an action on contract facts properly pleadable as a defense at law were so pleaded and were also pleaded as an equitable counterclaim for rescission, and trial of the legal issue resulted in a general verdict for plaintiff, there was no material error in granting a motion for judgment on the verdict before formally disposing of the counterclaim by findings against the defendant.
2. An unqualified admission of a party against his interest does not preclude sending the issue involved to the jury where there is credible evidence fairly conflicting therewith.
3. The question whether, when an insurance policy was issued, the company was notified of existing insurance on the property, is *held*, on the evidence, to have been properly one for the jury.
4. In an action upon a fire insurance policy the court charged that in case plaintiff recovered he was entitled to recover twelve nineteenths of the value of the house destroyed, but not to exceed $1,200; three eighths of the value of the furniture, but not to exceed $75; two thirds of the value of the wearing apparel, but not to exceed $50, and the value of the provisions, but not to exceed $50. There was no question that the limit of legitimate recovery for the provisions was two thirds of $19.21, and it does not appear that the jury allowed a greater amount therefor. *Held*, that the instruction as to the provi-

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sions was not prejudicially erroneous, since the jury must have understood that they were to allow only two thirds of their value.

5. Sworn proofs of loss were received in evidence, and plaintiff testified that the statements therein as to the value of the personal property destroyed were correct. There was no objection to this evidence on the ground that it was not directed to market value, and no cross-examination showing that it was not so directed. *Held*, that this evidence was sufficient to take the case to the jury on the question of value.

6. A verified copy of a paper is not necessarily receivable in evidence merely because the original is beyond the jurisdiction of the court. There should be, at least, some fair showing of efforts to obtain the use of the original, unless it is clear that they would have been fruitless.

7. In the absence of statutory prohibition or some rule of public policy to the contrary, a contract of insurance, whether made with a mutual or other company, will prevail over provisions in the articles of organization or by-laws of the insurer inconsistent therewith.

Appeal from a judgment of the circuit court for Green Lake county: Chester A. Fowler, Circuit Judge. *Affirmed.*

Action to recover $1,375 on a policy of fire insurance. The complaint was in the usual form. Defendant answered admitting the execution and delivery of the policy but claiming that it was void because the occurrence was produced by false representations of the plaintiff of facts material to the risk, which falsity was not known to the assurer till after the loss occurred. The answer also put in issue the allegations of the complaint as to the interest of plaintiff in the property; also as to the amount of loss sustained and as to giving notice of loss as required by the contract. Defendant pleaded, particularly, that when the policy was applied for plaintiff represented that the cost and value of the dwelling house was $1,800, whereas the value did not exceed $950; that it was expressly agreed that defendant should not be liable for more than two thirds of the cash value of any building insured, and that not more than two thirds of the cash value of any building would be insured by the company, which was well

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known to the plaintiff; that at the time application for the insurance was made plaintiff falsely and fraudulently represented to defendant that there was no existing insurance on the property, while in truth there was such insurance to the amount of $1,200, $700 being on the dwelling house, $100 on the household furniture, $25 on beds and bedding, $25 on family wearing apparel, $25 on provisions, and $325 on other items, said insurance being in the Insurance Company of the State of Illinois; that no notice of such existing insurance was given to the defendant, and that such circumstance of existing insurance and that no notice was given to the defendant rendered the policy void by its terms. Defendant further answered that in furtherance of the fraud attempted as aforesaid, after the loss occurred, plaintiff delivered to the defendant a paper wherein he falsely swore that the dwelling house was worth $1,800, whereas it was only worth $950.

The facts aforesaid pleaded to defeat the policy on the ground of fraud were set forth as a counterclaim for rescission. The counterclaim was duly replied to. The jury rendered a general verdict in favor of the plaintiff. Proper motions and exceptions were taken to raise the questions discussed in the opinion.

The equitable issue raised by the counterclaim, after the court granted plaintiff's motion for judgment, was in form closed by findings of fact to the effect that the allegations of fraud were untrue; that there was insurance on the plaintiff's property when the policy in question was taken out, and that defendant was duly informed thereof; that plaintiff represented the dwelling house to have cost $1,800, and that it in fact cost that sum. Judgment was accordingly entered upon the verdict.

For the appellant there were briefs by *George B. Heaney* and *Thompson, Thompson & Pinkerton,* and oral argument by *J. C. Thompson.*

For the respondent the cause was submitted on the brief of *Perry Niskern.*

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MARSHALL, J. Some complaint is made respecting the manner in which the court disposed of the cause of action set forth by way of counterclaim for a rescission of the contract of insurance. All the facts in regard thereto were properly pleadable as a defense at law, were so pleaded, and the issues raised in respect thereto were tried and closed by the verdict of the jury. Such being the case it does not seem necessary to consider any question as to the equitable defense.

It is undisputed that the contract of insurance, unless appellant was notified when it was made of the then existing insurance on the property, was void under the provisions thereof on that subject. The issue as to that was submitted to the jury by the court and the finding was in respondent's favor. Appellant's counsel claim that the evidence is conclusive that no notice of the existing insurance was given to the company and therefore that the verdict should have been set aside and a new trial granted, as requested.

The evidence as to the existing insurance is substantially as follows: Respondent applied to Mr. Hardell, secretary of the appellant, for insurance, who introduced him to Mr. Swanke, its agent, through whom the policy was obtained. Both Hardell and Swanke testified, unequivocally, that respondent said to them that he had no insurance on the property; that there had been some but that it had run out. Respondent when first examined on the trial testified that he told such agent that he had insurance for one half the amount with a Mr. Schumekosky, through whom he obtained a loan. On redirect examination, later, he said he told the agent that the previous insurance had run out. When examined under sec. 4096, Stats. 1898, before trial, he said he told Hardell that he had taken out insurance but "it run out, I don't know when," and he said to the agent in answer to the question as to whether there was insurance on the property, "Yes, it run out I don't know when, it will run out I don't know when, or may have run out I don't know when." One of respondent's

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daughters who was present when the application was made testified that her father said to the agent that he got $1,200 of insurance through Mr. Schumekosky when the house was in process of construction; that he could not otherwise borrow money to finish it; that after he got the house done he wanted it to be in the appellant company when the other insurance should run out. She further testified that her mother expressed surprise at the charge of $10 for the policy in question, saying that in the other company we just had $1,200 altogether and had to pay $18. Another daughter of respondent, testifying on the subject of what occurred between respondent and the agent, said: "Pa said he has got insurance on the house for $1,200, but it shall run out, but he did not know when." The evidence was undisputed that the agent asked the question in the written application as to whether there was any insurance on the property, and that it was answered, but that the answer was not written down. There are some other minor evidentiary circumstances relating to the matter, but none which materially change the situation indicated by the foregoing.

It must be conceded that the evidence is far from being satisfactory, but whether it be susceptible of conflicting reasonable inferences is quite another matter. If it be, then the court, upon familiar principles, properly left to the jury the labor of drawing the proper inferences.

The contention of counsel for appellant that respondent should be held bound by his admission made on two occasions that he informed appellant's representatives that the previous insurance had run out, we cannot approve in face of the evidence of contrary statements made by him, and other evidence somewhat supporting the latter. This court upon a careful consideration of the matter in *Montgomery v. State,* 128 Wis. 183, 107 N. W. 14, held that an unqualified admission of a party against his interest does not preclude sending the issue involved to the jury where there is credible evi-

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dence fairly conflicting therewith. It is considered here that the decision of the trial judge, who saw the witnesses and heard their testimony, should not be overruled in view of the fact that respondent testified on the two occasions when he made the admissions against his interest directly in conflict therewith, and there is some indication that he did not have a very correct idea of how to express past time as distinguished from present or future time, and the testimony of his two daughters rather supports the idea that he said to the agent that he had other insurance but did not know when it would run out. We will not discuss this branch of the case further. The trial court certainly had a much better opportunity to discover whether conflicting reasonable inferences could be drawn from the evidence than we have. There is no such clear indication of error in the conclusion reached as to warrant us in disturbing it.

It is insisted that the trial court erred in rejecting this requested instruction:

"If you find from the evidence that *Mr. Bruger* told Hardell and Mr. Swanke that the prior insurance had run out, your verdict should be for the defendant."

From what has been said the instruction was properly rejected. The effect of it was that respondent should be held bound by his evidence of statements made to appellant's representatives that the previous insurance had run out, though he may have made contrary statements and been sufficiently supported in respect thereto to warrant the jury in finding that the agent was in fact notified of the existing insurance. Moreover, it seems that the real issue in respect to the matter was fairly submitted to the jury in these words:

"Unless you are satisfied that a preponderance of the evidence establishes that information as to other insurance was given to Swanke, as claimed by plaintiff, your verdict must be for the defendant."

The jury must have understood that instruction to refer to existing insurance. That was the vital matter, as the whole

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trend of the case clearly indicated. It must have been appreciated by the jury to be a turning point in the cause.

This instruction is claimed to have been injuriously misleading:

"In case plaintiff recovers he is entitled to recover twelve nineteenths of the value of the house destroyed, but not to exceed $1,200; three eighths of the value of the household furniture destroyed, but not to exceed $75; two thirds of the value of the family wearing apparel destroyed, but not to exceed $50, and the value of the provisions destroyed, but not to exceed $50."

There was no question, it seems, but what the limit of legitimate recovery for the provisions destroyed was two thirds of $19.21. The instruction on that branch of the case might well have been more precise, but it does not seem that the jury could have fairly gathered the idea from what the court said, under all the circumstances, that only a proportionate share of the value destroyed as to all other property but the provisions was recoverable, and that it was competent to allow him the full value thereof or of the part destroyed. It is considered that they must have taken the instruction as if it read, two thirds of the value of the family wearing apparel destroyed, but not to exceed $50, and of the value of provisions destroyed, not to exceed $50. There can be no reasonable doubt but what that is just the idea the court intended to express and which one would naturally gather from the whole instruction on the subject of damages, in view of all the circumstances. The word "of" after the word "and," making the instruction read "and of the value of the provisions," etc., seems to be in place by necessary implication.

We are unable to see from the analysis which counsel for appellant make of the total amount found by the jury, or from anything we can discover, that the jury in making up their verdict failed to allow the proper amount for destroyed provisions. Such analysis has been carefully tested by the record with the result indicated.

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The next claim made is that there was no evidence to go to the jury on the question of the value of the personal property destroyed. The sworn proofs of loss were offered in evidence, and respondent testified in respect to the statement therein contained regarding the values of the destroyed personal property that it was correct. There was no objection to the competency of this evidence, in that it was not directed to the market value, nor any cross-examination showing that it was not so directed. It is considered that such evidence was proper for consideration by the jury and was sufficient to carry the case thereto on the subject to which it related.

A paper was produced claimed to be a substantial copy of the application made for the first policy. It was offered in evidence for the purpose of showing that, therein, respondent placed the value of the house at $950, whereas when the policy in suit was taken he represented it to be worth $1,800. The agent who sent the original to the insurance company testified that the copy was correct, except in some particulars not material. There was no excuse given for not producing such original, except that it was out of the jurisdiction of the court. On objection the paper was rejected. The claim is made that error was thus committed and the ruling in *Speiser v. Phœnix Mut. L. Ins. Co.* 119 Wis. 530, 533, 97 N. W. 207, is relied on. In that case there was proof that the possessor of the original was out of the jurisdiction of the court and refused to allow it to go out of the office. A deposition was therefore taken, the original paper being produced, copied, and the copy certified and attached to the deposition in lieu of the original. Under those circumstances the court held that secondary evidence was admissible. Here, as has been observed, no effort was made to obtain the original paper. Under the circumstances we are not inclined to go so far as to hold that the ruling of the trial court upon the question of competency is so clearly wrong that it should be held erroneous; that a verified copy of a paper should, at all events, be

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received in evidence merely because the original is beyond the jurisdiction of the court. The better practice is, in such cases, to do as was done in *Speiser v. Phœnix Mut. L. Ins. Co., supra.* At least some fair showing should be made of efforts to obtain the use of the original, unless it is clear that they would have been fruitless. For aught that appears, the possessor of the original, upon application, would have allowed appellant the use of it. Moreover, no reason is perceived why evidence could not as easily have been made as in the *Speiser Case.* The authorities cited there do not go so far as to clearly support the offer of the copy in question. In *Bonner v. Home Ins. Co.* 13 Wis. 677, the court very clearly indicated the necessity for a much better foundation for the reception of the secondary evidence than mere proof of the original being beyond the jurisdiction of the court. In *Wis. River L. Co. v. Walker,* 48 Wis. 614, 4 N. W. 803, the same is true. There proof was made of a demand for the original and a refusal to produce or exhibit it. In 1 Jones, Evidence, § 217, it is said that in the federal court the secondary evidence is held admissible without notice to produce or effort to obtain the original where it is out of the jurisdiction of the court, but it is said that other courts hold otherwise, and that the better practice is to take the deposition of the person having possession of the original; that a copy may then be made a part of the deposition, or in case the witness refuses to produce it secondary evidence may be given. It seems that the safe practice is along the lines indicated, though we do not now hold that an effort to obtain the original or a certified copy in proceedings to take a deposition is absolutely essential. However, as indicated, there must be some foundation for receiving the secondary evidence more substantial than the mere fact that the original paper is out of the jurisdiction of the court.

Further error is claimed because the court refused to receive in evidence a pamphlet claimed to contain a copy of the

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articles of organization and by-laws of appellant, for the purpose of showing that they prohibited the company from insuring more than two thirds of the value of any property including the insurance of other companies. The articles and by-laws of the company were not incorporated in the policy nor made a part thereof by reference, and the condition in the contract did not contain the words "including the insurance of other companies." While it is doubtful, at least, whether the offered evidence was admissible, it is a sufficient answer to the assignment of error that the exclusion thereof was not harmful, since the rule is that, in the absence of a statutory prohibition or some rule of public policy to the contrary, the contract of insurance, whether made with a mutual or other company, will prevail over provisions in the articles of organization or by-laws of the insurer inconsistent therewith; that the latter cannot invoke any such inconsistent by-law or article to defeat a policy claim. *Ledebuhr v. Wis. T. Co.* 112 Wis. 657, 88 N. W. 607; *Wuerfler v. Trustees Grand Grove W. O. D.* 116 Wis. 19, 92 N. W. 433; *Koerts v. Grand Lodge Hermann's Sons,* 119 Wis. 520, 97 N. W. 163. In the last case cited, as regards the efficiency of a provision of the organic law of a company to avoid a contract which was knowingly issued in violation thereof, the court, speaking by Mr. Justice WINSLOW, said:

"In the absence of an absolute statutory prohibition, or a violation of public policy, a mutual benefit society cannot defend on this ground where it has knowingly issued a certificate payable to such a beneficiary, and the assured has fully performed the contract on his part."

There is no other question presented that seems to require special treatment. As said at the beginning, the manner in which the court disposed of the equitable issues we do not deem material, since it is in harmony with the verdict which covered the whole subject involved.

By the Court.—The judgment is affirmed.

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EARLEY, Appellant, vs. WINN, Respondent.

September 11—October 9, 1906.

Slander: Evidence: Reputation of plaintiff: Hearsay: Impeachment of witness: Express malice: Cross-examination: Discretion: Parts of conversation: Right to prove whole: Separate slanders: Instructions to jury: Meaning of words spoken: Court and jury: Pleading construed: Separate causes of action: Words actionable per se: *"Infamous punishment."*

1. In an action for slander evidence as to plaintiff's general reputation, in mitigation or partial denial of damages, must be confined to reputation in respect to the fault or trait of character involved in the offense charged.
2. Where the alleged slander was to the effect that plaintiff had been "whipping her mother," evidence that prior to the slander plaintiff had a general reputation for quarreling with and illtreating her mother was admissible on the question of damages; but evidence as to such reputation at the time of the trial was wholly inadmissible.
3. Evidence in such a case of specific instances of quarrels between plaintiff and her mother at times other than that of the alleged whipping, did not tend to prove that whipping; nor was such evidence admissible to show plaintiff's reputation in that respect.
4. Evidence of statements made to third persons by the mother as to plaintiff's treatment of her was hearsay and inadmissible.
5. A witness cannot be impeached by proof that he has made statements contradictory to his testimony, unless such statements are material to the controversy.
6. A defendant who uttered a slander upon his own authority and as of his own knowledge cannot, in order to minimize or defeat the inference of express malice, prove the unsworn statements of others or current rumors injurious to the plaintiff.
7. The extent to which cross-examination of witnesses may go is a matter peculiarly within the discretion of the trial court.
8. A witness for defendant who had testified as to what happened at the time the alleged slander was uttered, and to a subsequent conversation with certain persons, was asked on cross-examination whether he did not tell them that he knew nothing of the occurrence. *Held*, that the question was proper either as contradicting the witness or as a basis for impeaching testimony.

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9. When one party gives in evidence a portion of a conversation material to the controversy, the other party may give the whole thereof, at least so far as it has any relation to the portion already offered.
10. In an action wherein the complaint charged at least two slanders, the court instructed the jury that if they found that defendant did not speak substantially the words alleged in the complaint he was entitled to a verdict. Plaintiff's counsel did not request any such modification or amplification of the instruction as would inform the jury that they might find a verdict for plaintiff if they found that either of the alleged slanders had been uttered. Whether, in the absence of such request, the instruction given was so clearly erroneous as to necessitate a reversal, is not determined.
11. Defendant was alleged to have said to plaintiff in the presence of others: "Shame, shame, B. W., whipping your mother! She abuses her mother, and this isn't the first time either." *Held*, that these words, besides asserting that plaintiff had just been whipping her mother, were capable of being understood as asserting that there had been other like abuse on previous occasions, and that the question whether they had that meaning to the hearers should have been left to the jury.
12. A complaint alleged the speaking of certain defamatory words in the presence of certain persons and, a few minutes later, at another place, the speaking of other defamatory words, and that "said false and defamatory words were maliciously spoken" in the presence of certain persons named "and divers other persons and at divers other times and places." *Held*, that the words last quoted did not constitute a charge of distinct slanders at other times and places and to other persons, and that, to warrant the admission of evidence of such other statements as separate and independent slanders and not merely as bearing upon the question of malice, they should have been pleaded as separate causes of action.
13. Spoken words falsely charging an indictable crime involving moral turpitude or which would subject the person charged to an infamous punishment are actionable *per se*.
14. Imprisonment in the county jail is "an infamous punishment," within the meaning of the above rule, and, an assault and battery being so punishable, spoken words falsely charging that crime are actionable *per se*.

Appeal from a judgment of the circuit court for Columbia county: E. Ray Stevens, Circuit Judge. *Reversed.*

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Action of slander, for that the defendant spoke of and concerning the plaintiff, on October 25th, in the presence of one James Lake and divers other persons, the following: "We want you to come with us to Woods'. Something is wrong. *Bertha* [meaning this plaintiff] is whipping her mother." Whereupon the person addressed, the city marshal, with the defendant, repaired to the plaintiff's residence, where defendant said, "Shame, shame, *Bertha Wood* [meaning this plaintiff], whipping your mother! She abuses her mother, and this isn't the first time either. Why don't she come down and vindicate herself?" The complaint also alleged that the said false and defamatory words were maliciously spoken in the presence of several persons named and divers other persons at divers other times and places. The answer denies the utterance of the libel, and justifies that at the time referred to plaintiff was in fact engaged in the act of whipping her mother, and that any statements of his were made only to persons then present who had knowledge of the fact. The answer further alleges that plaintiff's mother had prior thereto stated to the defendant that she was in danger of injury at the hands of her daughter, the plaintiff, and had requested him to come to her aid in case he should hear any disturbance at the house. A general verdict for the defendant was rendered upon trial, from judgment on which plaintiff brings this appeal.

Daniel H. Grady, for the appellant, argued, among other things, that charging a person with a crime punishable by imprisonment in the county jail is actionable *per se. Miles v. Oldfield,* 4 Yeates (Pa.) 423, 2 Am. Dec. 412; *Miller v. Parish,* 8 Pick. 384; *Woodbury v. Thompson,* 3 N. H. 194; *Frisbie v. Fowler,* 2 Conn. 707; *Andres v. Koppenheafer,* 3 S. & R. 255, 8 Am. Dec. 647; *Harker v. Orr,* 10 Watts, 245; *Smith v. Silence,* 4 Iowa, 321, 66 Am. Dec. 137; 18 Am. & Eng. Ency. of Law (2d ed.) 892; *Routley v. Harris,* 18 Ont. 405; *Wilcox v. Edwards,* 5 Blackf. 183; *Murray v.*

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McAllister, 38 Vt. 167; *Young v. Miller,* 3 Hill, 21; *Gudger v. Penland,* 108 N. C. 593, 23 Am. St. R. 73; *Fountain v. West,* 23 Iowa, 9, 92 Am. Dec. 406; *Burton v. Burton,* 3 G. Greene, 316; *Lemons v. Wells,* 78 Ky. 117. Counsel cite no case where any court ever held that to charge a woman with the offense of assaulting and whipping her own mother was not actionable *per se.* Words spoken of a woman may be actionable, although the same words spoken of a man might not be. *Malone v. Stewart,* 15 Ohio, 319, 45 Am. Dec. 577; *Alfele v. Wright,* 17 Ohio St. 238, 93 Am. Dec. 615; *Davis v. Brown,* 27 Ohio St. 326, 329, 331; 18 Am. & Eng. Ency. of Law (2d ed.) 881; *Hess v. Sparks,* 44 Kan. 465; *Mitchell v. Sharon,* 51 Fed. 424; *Miller v. Parish,* 8 Pick. 384; *Brown v. Nickerson,* 5 Gray, 1.

For the respondent there was a brief signed by *Olin & Butler,* of counsel, and oral argument by *A. F. Kellogg* and *J. M. Olin.* They contended, *inter alia,* that the charging of the offense of assault and battery is not actionable *per se.* The imputation of an indictable or punishable offense is not actionable unless the offense involves moral turpitude; the imputation of an offense involving moral turpitude is not actionable unless the offense is indictable; and the imputation of an offense involving moral turpitude which is indictable by statute, though only a misdemeanor, is actionable. *Turner v. Ogden,* 2 Salk. 696; *Ogden v. Turner,* 6 Mod. 104; *Onslow v. Horne,* 3 Wils. 177; *Holt v. Scholefield,* 6 T. R. 691; 2 Hare & W. Am. Lead. Cas. (5th ed.) 97; *Skinner v. White,* 1 Dev. & Bat. Law, 471; *Brooker v. Coffin,* 5 Johns. 189; *Van Ness v. Hamilton,* 19 Johns. 349; *Widrig v. Oyer,* 13 Johns. 124; *Young v. Miller,* 3 Hill, 21; *Anonymous,* 60 N. Y. 262; *Case v. Buckley,* 15 Wend. 327; *Bissell v. Cornell,* 24 Wend. 354; *Crawford v. Wilson,* 4 Barb. 504, 510; *Quinn v. O'Gara,* 2 E. D. Smith, 388; *Baxter v. Mohr,* 76 N. Y. Supp. 982; *Andres v. Koppenheafer,* 3 S. & R. 255; *Beck v. Stitzel,* 21 Pa. St. 522; *Gosling v. Morgan,* 32 Pa.

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St. 273; *Hillhouse v. Peck,* 2 Stew. & P. 395; *Dudley v. Horn,* 21 Ala. 379; *Berdeaux v. Davis,* 58 Ala. 611; *Billings v. Wing,* 7 Vt. 439; *Redway v. Gray,* 31 Vt. 292; *Underhill v. Welton,* 32 Vt. 40; *Murray v. McAllister,* 38 Vt. 167; *Kimmis v. Styles,* 44 Vt. 351, 354; *McCuen v. Ludlum,* 17 N. J. Law, 12; *Hollingsworth v. Shaw,* 19 Ohio St. 430; *Hayner v. Cowden,* 27 Ohio St. 292, 296; *Mills v. Wimp,* 10 B. Mon. 417; *Smith v. Smith,* 2 Sneed, 473; *Kinney v. Hosea,* 3 Harr. (Del.) 77; *Taylor v. Kneeland,* 1 Doug. 67, 72; *McCarty v. Barrett,* 12 Minn. 494, 495; *Burton v. Burton,* 3 G. Greene, 316; *Harrington v. Miles,* 11 Kan. 480; *Hansbrough v. Stinnett,* 25 Grat. 495, 498; *Hoag v. Hatch,* 23 Conn. 585; *Giddens v. Mirk,* 4 Ga. 364, 368; *Speaker v. McKenzie,* 26 Mo. 255; *Coburn v. Harwood,* Minor (Ala.) 93, 12 Am. Dec. 37, and note; *Pollard v. Lyon,* 91 U. S. 225; *Montgomery v. Deeley,* 3 Wis. 709, 712; *Ranger v. Goodrich,* 17 Wis. 78; *K—— v. H——,* 20 Wis. 239; *Filber v. Dautermann,* 26 Wis. 518, 520; *S. C.* 28 Wis. 134, 136; *Mayer v. Schleichter,* 29 Wis. 646; *Robertson v. Edelstein,* 104 Wis. 440. If it is actionable *per se* to falsely charge orally the offense set forth in the complaint in this action, then it is equally actionable *per se* to falsely charge orally any one of the many petty offenses punishable under our statutes by fine or imprisonment or by both.

Dodge, J. The exceptions reserved and the assignments of error predicated thereon are very numerous, and many of them will be found unnecessary of consideration. An attempt will be made, as far as possible, to summarize those which present questions relevant to the integrity of the judgment, or likely to arise upon another trial.

1. Several assignments of error rest upon admission of evidence of a general reputation of the plaintiff for quarreling with and illtreating her mother before the utterance of the slander, of which the only actionable words charged the of-

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fense of "whipping" her. The law is well settled elsewhere and in Wisconsin that in any attempt to prove reputation, other than general reputation, in mitigation, or, to speak more accurately, in partial denial, of damages, the proof must be confined to reputation in respect to the fault or trait of character involved in the offense charged. *B—— v. I——*, 22 Wis. 372; *Wilson v. Noonan,* 27 Wis. 598; *Wilson v. Young,* 31 Wis. 574, 578; *Kimball v. Fernandez,* 41 Wis. 329; 18 Am. & Eng. Ency. of Law (2d ed.) 1100. Thus, under charge of fornication, reputation for general unchastity, and, under charge of accepting money to influence action as a state senator, bad reputation for official honesty and integrity, were held admissible. The Wisconsin cases declare that the reputation must relate to the very fault or offense charged in the libel or slander, although text-writers use the expression "trait of character involved." It is plain from the testimony of several witnesses that they knew of no reputation for physical abuse, such as whipping, but had heard that the mother complained that plaintiff was no daughter to her; that she (the mother) was nothing in the house. Doubtless the same attribute of character involved in any illtreatment is also involved in an assault or whipping, but it may well be argued that other traits, differing not only in degree or intensity but in kind, are to be found in the latter. Illustrations from the authorities, however, seem to bring the objected evidence within the rule. Thus, under charge of perjury, a generally bad reputation for truth and veracity has been sustained (*Moyer v. Moyer,* 49 Pa. St. 210); also, under charge of adultery, general reputation for licentiousness and unchastity, though fornication not criminal (*Bridgman v. Hopkins,* 34 Vt. 532); under charge of larceny, general reputation for want of honesty and integrity (*Warner v. Lockerby,* 31 Minn. 421, 18 N. W. 145, 821); charge of embezzlement by jockey of horses' winnings justified general reputation for want of integrity in accounting

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to employers for the earnings of their horses (*Finley v. Widner,* 112 Mich. 230). Illustrations of reputation excluded as not presenting the same traits of character are *Cole v. Perry,* 8 Cow. 214; *Dillard v. Collins,* 25 Grat. 343. We conclude, with some hesitation, that no error was committed in admitting against plaintiff the evidence of a general reputation for quarreling with and illtreating her mother.

2. The evidence of reputation was not confined to a period prior to the date of the alleged slander, but, in large part, was in response to questions which apparently related to the time of trial. Later some of the witnesses were recalled and testified again to the existence of bad reputation prior to the date of the slander, but this left standing the testimony of numerous witnesses that at the time of the trial the plaintiff's reputation was bad for quarreling with and illtreating her mother. Of course such testimony was wholly inadmissible, and probably highly prejudicial as vilification and abuse of the plaintiff, and perhaps, also, inclining the jurors' minds to belief in the truth of the alleged slander. There is some question whether the objections were such as to call the attention of the court to the vice now criticised by the appellant. We shall content ourselves with the above expression of views as to the propriety of such evidence, and presume the question will not present itself again. In the same connection an instruction was requested and refused that only the reputation prior to the slander could be considered upon the question of damages. This, or some equivalent for it, should certainly have been given, but no reversal can be predicated upon this refusal, since the jury found no cause of action to exist; hence no failure to instruct them as to the measure of damages could be prejudicial.

3. Error is assigned upon admission of proof of specific instances of verbal quarrels between the plaintiff and her mother: on one occasion, about six hours before the time of the alleged whipping set up in the answer; on another, by

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the testimony of a witness to the entire period from the preceding noon until the time of such supposed whipping at midnight; and again, the testimony of the mother herself, generally to the effect that there had been a good deal of trouble in the family within the last three years, and that people had overheard quarrels and disturbances frequently, and that plaintiff had been, when in anger, loud and quarrelsome. This evidence had no bearing whatever on the question whether plaintiff did in fact whip her mother at the specific time alleged, except, possibly, some of the testimony of Woolston, confined to the time of the alleged assault. The fact that high words and jangling were heard twelve hours before or six hours before certainly could not have tendency to prove the fact of physical assault at the time in question. The only other issue presented by the defense was that of the plaintiff's reputation, and no rule is better settled than that specific instances, even of the same acts as those charged in the slander, cannot be proved to establish that issue. *Muetze v. Tuteur,* 77 Wis. 236, 46 N. W. 123; *Mahoney v. Belford,* 132 Mass. 393. We can conceive no justification for the admission of this evidence, and its prejudicial effect, in tending generally to vilify and discredit plaintiff before the jury, is so entirely obvious that we cannot doubt that in its admission prejudicial error was committed for which the judgment must be reversed.

4. Error is assigned upon the admission of hearsay evidence, specially the testimony of others as to statements made to them by Mrs. Wood, the plaintiff's mother. Illustrations are: The testimony of the defendant that she said to him, "My life is not safe down there, the way I am treated." And again, that after the slander she said to him, on one occasion, that she was not allowed to eat at the table with them; that she was treated like a dog, and that *Bertha* had taken up the very treatment of her that her father had been using for years. Also testimony of Mr. and Mrs. Lake that after the

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slander Mrs. Wood said to them that she could hardly live with *Bertha* (plaintiff) and the rest of them, and that she also referred to the night in question as "that night after I got the pounding." "Got that awful pounding, she said." It is difficult to conceive of any more improper or prejudicial testimony than this. The plaintiff's witnesses, including Mrs. Wood, had all testified that there was no whipping, striking, or assault on the night in question, and the last quotation from Mrs. Wood tended directly to establish defendant's justification that there was, by conveying to the jury the idea that she had stated that there was pounding that night. Being hearsay, it was excluded by the most elementary rules of evidence. *O'Toole v. State,* 105 Wis. 18, 80 N. W. 915; *Koepke v. Milwaukee,* 112 Wis. 475, 88 N. W. 238. Apparently this testimony was offered as impeaching Mrs. Wood, but it suffices to say that the reference to receiving a pounding on the night in question was admitted without laying any foundation by asking Mrs. Wood whether she had made the statement or not. As to the other three statements, some attempt at foundation was made, but one of the elementary qualifications of the right to prove statements made by a witness contradictory to her cross-examination is that such statements must be material to the controversy. *Barton v. Bruley,* 119 Wis. 326, 327, 96 N. W. 815. The issues, as already stated, were whether the plaintiff did whip her mother on the night of October 25th, and whether she had a general reputation in the community for such acts prior to the slander. It is, of course, obvious that none of Mrs. Wood's statements above quoted, except the last, could be in any wise material to either of those issues. This assignment of error must therefore be sustained, and, since the prejudice to the plaintiff is very obvious, is ground of reversal.

5. A question is presented which, though not argued, is perhaps important upon another trial, as to the admissibility of the first of these statements as bearing on the defendant's

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express malice. He testified, over objection at all points, that some time before the 25th of October Mrs. Wood, plaintiff's mother, had said to him, "If you hear any noise or rumpus down there, I wish you would investigate; my life isn't safe down there, the way I am treated;" also that he went to the plaintiff's house on account of that request on the evening of the 25th because one James Lake reported some trouble that he (Lake) thought was in progress. The answer sets forth that prior to the alleged whipping Mrs. Wood had given some such information to the defendant, and that the only reason of his going to the house was to aid Mrs. Wood, and that he said nothing to anybody about such whipping, or what he had seen, except pursuant to rendering aid to Mrs. Wood. The answer elsewhere denied, as did the witness on the stand, that he had ever told any one that plaintiff whipped, or that she was whipping, her mother.

While it must be conceded that this is a very inadequate pleading of previous circumstances tending to show absence of express malice in the defendant by inducing him to believe that plaintiff did whip her mother on the night of the 25th of October, or indeed at any other time, we have been led to examine the question whether, if sufficiently pleaded, such a statement would be admissible.

The weight of authority, with some confusion, is in favor of the proposition that the defendant may give in evidence, to show his belief in the truth of the statements made by him, and thus in some degree to refute the inference of express malice, such facts and circumstances as were within his knowledge tending to arouse such belief. In immediate connection with this doctrine are a multitude of rather ill-considered cases upon the question how far he can prove rumors, reports, or statements which have come to his knowledge, and which, of course, would ordinarily be excluded as mere hearsay. Such reports and rumors have been offered and discussed as affecting two issues usually present in cases of slan-

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der and libel: first, as bearing upon the pre-existing general reputation of the plaintiff and thus tending, not to mitigate damages, but to disprove, in some degree, the amount of damages actually suffered; and, secondly, to show reason for a belief by the defendant in the facts which he states and thus acquit him of uttering intentional falsehood, and thus mitigate exemplary damages. Of course, a statement such as this from Mrs. Wood could have no bearing upon plaintiff's general reputation. But if she had stated categorically to defendant that plaintiff had whipped her, could defendant offer it in disproof of his malice in stating, as of his own knowledge, such fact? For such a proposition we have succeeded in finding no direct authority, except the declaration above mentioned, that defendant may prove facts and circumstances, though in some cases, apparently, the distinction between facts of a witness's own knowledge and reports and hearsay is not noticed. Other cases have held that where the slander or libel on its face stated something as said by others, or declared by common rumor, the defendant might prove, not the defamatory fact, but the report of it, since that was the matter which he had asserted, not as defense, but as tending to refute his express malice. *Kennedy v. Gregory,* 1 Bin. 85; *Orth v. Featherly,* 87 Mich. 315, 320, 49 N. W. 640; *Fowler v. Fowler,* 113 Mich. 575, 71 N. W. 1084; *Lewis v. Humphries,* 64 Mo. App. 466; *Eviston v. Cramer,* 54 Wis. 220, 11 N. W. 556. That distinction has been applied most commonly to newspaper publications, made upon the faith of either investigation or information, or of other similar publications. Generally, however, it is said it is no defense that the speaker did not originate the scandal, but heard it from another, even though it was a mere current rumor and he in good faith believed it to be true. Newell, Libel & S. (2d ed.) 350. The inadmissibility of rumors or reports to establish plaintiff's belief in the truth of his statement has been declared in many cases. *Thompson v. Bowers,* 1 Doug. 321;

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Bodwell v. Swan, 3 Pick. 376, 378; *Wolcott v. Hall,* 6 Mass. 514; *Peterson v. Morgan,* 116 Mass. 350; *Treat v. Browning,* 4 Conn. 408; *Matson v. Buck,* 5 Cow. 499; *Inman v. Foster,* 8 Wend. 602; *Hlasatel v. Hoffman,* 204 Ill. 532, 68 N. E. 400; *Sickra v. Small,* 87 Me. 493, 33 Atl. 9. The subject first received consideration in Wisconsin in *Haskins v. Lumsden,* 10 Wis. 359, where it was held in an action of libel that the defendant could not prove rumors or reports or information derived from credible sources. The court first pointed out the inapplicability of such hearsay under the rule admitting proof of facts and circumstances naturally inducing a belief in the truth. Many authorities were there considered, and it was pointed out that some of them supported only the admissibility of such general rumors and reports as far as relevant to plaintiff's reputation; others authorized proof of acts of the plaintiff himself within the knowledge of the defendant; and a distinction was also drawn between cases where the defendant had asserted the derogatory facts as of his own knowledge, instead of making it expressly and declaredly upon the authority of another's statement. It was said that none of the authorities went to the extent of admitting such evidence as was there offered which was not within either of these three reasons, and it was held inadmissible. Thus it seems that, in a somewhat controverted field of authority, this court at an early day adopted the view, then as now well sustained by the weight of authority, that mere hearsay by the way of rumor, report, or information could not be proved to establish defendant's belief in the truth of a nonprivileged statement made by him as of his own knowledge. Such conclusion has never been departed from, and the case of *Haskins v. Lumsden, supra,* has often been cited as authority, although not very exactly upon this point, and in both *Eviston v. Cramer,* 54 Wis. 220, 11 N. W. 556, and *Delaney v. Kaetel,* 81 Wis. 353, 51 N. W. 559, it is referred to as authority for the distinction between a state-

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ment by defendant as of his own knowledge and a statement of what has been charged by others or by common rumor.

Nothing is more elementary in the law than that information prejudicial to either party shall be given to the jury only by the sworn testimony of him who knows, and it is matter of common knowledge that, however inadmissible any evidence or a piece of hearsay testimony may be, and however carefully a court may endeavor to instruct the jury against giving it any weight as tending to prove the fact alleged in the hearsay, such evidence unavoidably does have weight; and if the statement made is prejudicial to a party it may often turn the scale against him in the verdict. It is, therefore, the policy of the law to exclude such hearsay, except where it is unavoidably admitted to prove some other fact. Courts may well hesitate between the interest of a defendant to let a jury know that somebody else had told him the fact which he had published against the plaintiff, in order to show his good faith in repeating the charge, and the great detriment to the plaintiff from having such unsworn statements placed before the jury; for if that were to be, it might often subject an entirely innocent plaintiff to having the loosest and most irresponsible calumnies published to the world against him, and the jury prejudiced unfavorably. In *Bodwell v. Swan,* 3 Pick. 376, it is said:

"These very stories may have originated in slander, and character could not be protected if the third or fourth circulator should be able to defend himself or reduce the damages because he only gave more publicity and added the weight of his character to calumny which had been originated by others."

Again, in *Wolcott v. Hall,* 6 Mass. 514, 518, by PARSONS, C. J.:

"The evidence of such reports would therefore be extremely oppressive to the plaintiff, and would encourage slander in the country by leading people to suppose that they were excusable in relating scandal if they were not the authors of it.

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. . . And if such reports could be given in evidence the subject of them, however innocent, instead of seeking redress from the laws, had better sink privately under the weight of unmerited calumny, lest by attempting his justification he should give notoriety to slanders which had before been circulated only in whispers."

In *Inman v. Foster,* 8 Wend. 602, 608, SAVAGE, C. J., urges:

"Although such evidence may tend to diminish the malice, yet it does not disprove it, and the effect it is calculated to produce on the plaintiff is to render his character suspicious. Its tendency is, if not to prove the truth, yet to create suspicions of the plaintiff's guilt, when the defendant dare not attempt to prove it, and therefore such testimony is inadmissible."

In *Treat v. Browning,* 4 Conn. 408, 417, HOSMER, C. J., in commenting on the injuries to the plaintiff, said:

"It is by far more just that the defendant, Catharine, who made an unqualified charge on the plaintiff, by a direct affirmation, and on her own personal credit, thus virtually assuming the responsibility of it, should, as was very expressively said by Chief Justice GIBBS, 'be answerable for the full measure of her slander.' "

These reasons, and others like them, appeal to us with great force, and persuade us that we should adhere to the view adopted by this court in *Haskins v. Lumsden, supra,* in holding that one who utters a slander upon his own authority and as of his own knowledge cannot, in order to minimize or defeat the inference of express malice, offer the unsworn statements of others or current rumors injurious to the plaintiff. As a result, we must hold that the statement of Mrs. Wood to the defendant should not have been admitted in evidence.

6. Error is assigned upon denial of privilege of cross-examination of certain of defendant's witnesses. We are impressed by the contrast between the restrictions which were imposed upon the plaintiff in this field and the wide liberality accorded the defendant in cross-examining the plaintiff's wit-

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nesses. The subject is, however, peculiarly within the discretion of the trial court, and it is seldom that the appellate court can be convinced that discretion is so abused as to furnish ground of reversal.

Defendant's witness Woolston, who gave testimony to the occasion on the night of October 25th, when it was claimed by the plaintiff that certain of the slanders were uttered, and by the defendant that an assault and whipping took place, was asked the question whether he did not tell certain persons that he knew nothing of the occurrence. Objection was sustained. It appears from the bill of exceptions that, just before, the same witness had been testifying to a conversation with certain persons, and apparently this question referred to the same one. If that were the fair understanding of it, so that the occasion was fully identified to the witness, this question was entirely legitimate, either as contradicting the witness or as basis for impeaching testimony. There may be some doubt, however, as to whether the occasion was so clearly defined, although the objection was not made on that ground. We think, also, that the restrictions placed upon cross-examination of the defendant's witness Robinson, in an attempt to show his partiality and willingness to aid the plaintiff and not the defendant, and in preventing him from identifying a certain newspaper publication, apparently as preliminary to some showing that he was responsible for the information there published, were at least an extreme exercise of the court's discretion in that field; but we are not prepared to say that such discretion was so overstepped that we should find ground of reversal.

7. Defendant having been allowed to give testimony of a witness who overheard part of a conversation between the plaintiff and her mother after the slander, in which the mother exclaimed "You are hounding me to death," which was claimed to refer to some coercion of her into giving testimony, the plaintiff was recalled and asked to state other things

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that were said in that conversation as explanatory of the portion above mentioned, which she did, but which, upon objection by defendant, was stricken out. The testimony so stricken out tended directly to explain the mother's exclamation and to show that it was in response to a not improper insistence that the mother ought to go to court and testify as to what took place on the occasion of the alleged whipping. It is a rule of evidence fully established and resting in reason, that, when one party gives in evidence a portion of a conversation material to the controversy, the other party may give the whole thereof, at least so far as it has any relation to the portion already offered. *Smith v. Milwaukee E. R. & L. Co.* 127 Wis. 253, 106 N. W. 829. This exclusion of the plaintiff from explaining the conversation might well have prejudiced her before the jury, and we must hold was error.

8. Error is assigned upon an instruction to the jury:

"If you find that the defendant did not speak substantially the words alleged in the complaint, then the defendant is entitled to a verdict at your hands."

This is complained of because it did not inform the jury that they might find a verdict for the plaintiff if they found any of the words sufficient to constitute a cause of action substantially proved. Doubtless such is the law. *Klaths v. Hess,* 126 Wis. 587, 591, 106 N. W. 251. In the complaint before us at least two slanders are charged. One, the assertion that plaintiff was whipping her mother, made by the defendant to the village marshal, and, a few minutes later, his exclamation in the presence of several people at the house of the plaintiff, "Shame, shame, *Bertha Wood,* whipping your mother! She abuses her mother, and this isn't the first time either." Of course, if the jury found either of these utterances to be proved, they could not find a verdict for the defendant in absence of justification. Hence the instruction is

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open to the criticism now urged. However, as that criticism is based upon mere absence of amplification of the idea conveyed, doubtless the plaintiff's counsel should have challenged the court's attention and requested such amplification or modification as would convey the correct idea to the jury. We shall not decide whether, in the absence of such request, this instruction was so clearly error as to necessitate a reversal upon that ground.

The court instructed the jury that if they found that the plaintiff did whip her mother on the occasion mentioned on October 25, 1902, they should find for the defendant. The justification in the answer extended only to this single occasion. The words alleged to have been uttered at the plaintiff's house, and of which some proof was offered, were, "Shame, shame, *Bertha Wood,* whipping your mother! She abuses her mother, and this isn't the first time either. Why don't she come down and vindicate herself?" It is claimed by the plaintiff that the words "she abuses her mother, and this isn't the first time either," are capable of being understood by the hearers as charging that at other times she had been guilty of such whippings; hence, that mere proof of an act of whipping on October 25th was not complete justification, and would not, as matter of law, entitle defendant to a verdict. The rule is, of course, well settled that the meaning of words alleged as slander is for the jury. The court can, at most, decide whether or not they are capable of a slanderous meaning. *Schild v. Legler,* 82 Wis. 73, 75, 51 N. W. 1099; *Robertson v. Edelstein,* 104 Wis. 440, 443, 80 N. W. 724; *Dabold v. Chronicle Pub. Co.* 107 Wis. 357, 362, 83 N. W. 639; *Scofield v. Milwaukee Free Press Co.* 126 Wis. 81, 87, 105 N. W. 227. We are persuaded that the words "*this* isn't the first time either," being immediately connected with the assertion that the plaintiff had just been whipping her mother, are at least capable of being understood as asserting that there had

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been other like abuse on previous occasions, and, if so capable, the question should have been left to the jury whether they had that meaning to those who heard them.

9. It is assigned as error that the court in effect ruled that the complaint was not broad enough to admit proof of a similar statement made by defendant on another occasion to one Stephens. It is not very clear whether the court made a ruling on the subject or not; but as the construction of the complaint may be important upon another trial, we should perhaps express ourselves thereon. The complaint, as already stated, alleged certain declarations to the city marshal and others, and a few minutes later, at the plaintiff's house, certain other defamatory words, and then proceeds to allege "that said false and defamatory words were maliciously spoken in the presence of James Lake, E. C. Earley, Alexander Wood, Finn Robinson, and divers other persons and at divers other times and places." It is claimed that this constitutes a charge of distinct slanders at other times and places and to other persons. We think the complaint is open to no such construction. Each occasion constitutes a separate cause of action. Townshend, Slander & L. (4th ed.) §§ 113, 327. If the defendant did at any other time and place make the same charge in the presence of one Stephens, as claimed, it was a separate and independent slander, and the subject of another suit or of a separate count in this complaint. If it was intended to set out such cause of action it should have been as a separate one. Sec. 2647, Stats. 1898; *Luther v. C. J. Luther Co.* 118 Wis. 112, 126, 94 N. W. 69. In absence of such pleading, no inference of such intent should be drawn, for the allegation of such repetitions, not so separately stated, and in connection with the single charge, was proper enough in a complaint attempting to set up one cause of action, for such repetitions were proper of allegation and proof as bearing upon the question of malice. *Born v. Rosenow,* 84 Wis. 620, 54 N. W. 1089; *Hacker v. Heiney,* 111 Wis. 313,

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316, 87 N. W. 249. It seems to us clear that, if plaintiff desired to offer proof of such publication as an independent slander, he should have so notified the defendant by setting it up as a separate cause of action.

10. Respondent's counsel devote much of their brief to a learned and interesting discussion of the history of the law of oral defamation and the fundamental reasons which control the definitions of actionable words. Seemingly, the conclusion reached, after much wavering by English courts, is that any words charging a crime punishable by imprisonment in the first instance are actionable *per se*. Newell, Libel & S. (2d ed.) 96. American courts have differed widely, but many have accepted a rule formulated by SPENCER, J., in *Brooker v. Coffin,* 5 Johns. 188, "In case the charge, if true, will subject the party charged to indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable." That rule has been adopted in Wisconsin in *Montgomery v. Deeley,* 3 Wis. 709, and different views elsewhere need not be considered. The adoption of this rule is, however, by no means the end of difficulty in ascertaining whether a given charge is slanderous *per se*. It suffices to that end either that the crime charged involves moral turpitude or that the punishment denounced be infamous. What crimes involve moral turpitude has been the subject of vast contention, extending from the view that moral turpitude inheres in every wilful breach of a criminal statute, to the position that only those crimes that present such vileness and depravity as arouses the abhorrence of all mankind are intended. Again, the decalogue, or some other scriptural inhibition, has been thought sufficient by some courts to conclusively ascribe moral turpitude to an act. Several courts have denied that any such characteristic inheres in mere assault and battery, even when the act charged was whipping a mother (*Speaker v. McKenzie,* 26 Mo. 255); or "snaking his mother out of doors

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by the hair of her head . . . the day before she died" (*Billings v. Wing,* 7 Vt. 439). It is probably true that moral turpitude depends on the conception of the community, which is reflected in the utterances of its judges. Keeping a gambling resort is so characterized in some places. *Buckley v. O'Niel,* 113 Mass. 193. We doubt whether a similar view would have been general in Monaco, or even in some of the United States, a few years ago. Wisconsin finds moral turpitude in selling watered milk. *Geary v. Bennett,* 53 Wis. 444, 10 N. W. 602. We confess to the view that such act is in no considerable degree lower in the moral scale than physical violence to one's mother.

Not only in the respect above mentioned is the aforesaid rule uncertain, but in the use of the expression "infamous punishment." Respondent's counsel contend that this expression had a definite meaning at common law, which necessitated some element in addition to mere imprisonment, such as castigation, branding, the pillory, and the like, and that we must assume such limitation for it in this rule. Such significance seems, *a priori,* improbable when we remember that hardly any, if indeed any, of those elements characterized the punishment for any crime at the time of declaring that rule in Wisconsin. While there is pretty general holding in other states that mere fine is not infamous punishment, and much conflict as to whether mere imprisonment in county jails should be so considered, we do not deem essential review or analysis of those cases, for we consider the latter question settled in this state by *Geary v. Bennett,* 53 Wis. 444, 446, 10 N. W. 602, where, with full deliberation, this court held that fine or imprisonment in the county jail constituted "infamous punishment, within the meaning of the rule above stated." That case has been frequently cited with approval, though the exact question now raised has not again been up for consideration. *Campbell v. Campbell,* 54 Wis. 90, 96, 11 N. W. 456; *Ellsworth v. Hayes,* 71 Wis. 427, 434, 37

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N. W. 249. We can see no sufficient reason now to depart from a rule of so long standing, and therefore hold that the charge set forth in the complaint is actionable *per se,* because it asserts a crime punishable by imprisonment in the county jail, by force of sec. 4388, Stats. 1898.

By the Court.—Judgment reversed, and cause remanded for new trial.

PARSONS, Respondent, vs. BALSON, Executor, Appellant.

September 12—October 9, 1906.

County court: Appeal: Failure to prosecute: Dismissal: Discretion: Setting aside judgment for fraud: Limit of time: Probate of will: Constructive fraud: Guardian ad litem: *Pleading: Lost or destroyed will: Presumption of revocation: Amendment of petition on appeal.*

1. Refusal of the circuit court to dismiss for want of prosecution, under sec. 4038, Stats. 1898, an appeal from county court which had been pending about five years, is *held* not to have been an abuse of discretion, it appearing that said time had been largely consumed in litigation of other cognate matters proper to be settled before proceeding with the appeal, and in negotiations for settlement, and that there had been destruction of papers and other matters, all tending to show that the delay was not unreasonable.
2. The power of the county court to set aside its order or judgment is not limited to one year after notice of the entry thereof, where such order or judgment was without jurisdiction or was the result of fraud.
3. 'Failure of the guardian *ad litem* of an infant heir to oppose the probate of a will giving all the property to another, and to call the attention of the court to undisputed facts showing that the will was not entitled to probate, was a constructive fraud upon the infant, justifying vacation of the order or judgment admitting the will to probate.'
4. The petition to set aside the order in such a case, although it does not in terms charge fraud, is sufficient if it alleges the facts constituting the constructive fraud.

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5. Under sec. 3791, Stats. 1898 (providing for the establishment of any will which shall be lost or destroyed by accident or design), if a reasonable time elapsed after testator's knowledge of the destruction of a will and before his death, and he had opportunity to reproduce it but did not do so, a presumption of revocation arises and the will cannot be admitted to probate.
6. Where a will was accidentally destroyed three years before the testator's death, with his knowledge, and he afterwards adopted a child, but did not reproduce said will or make a new one, it is *held* that the destroyed will was revoked.
7. A petition asking that an order admitting a destroyed will to probate be set aside because of the failure of the guardian *ad litem* of petitioner (an infant heir of the testator) to call the court's attention to undisputed facts showing revocation of the will, was denied by the county court. *Held*, that on appeal the circuit court properly allowed an amendment of the petition, setting up the claim of the petitioner as an after-born child and asking that an order assigning the real estate in accordance with the will be also set aside.
8. No appeal from the last-mentioned order was necessary in such a case, since it must fall if the probate of the will should be set aside.

Appeal from a judgment of the circuit court for Fond du Lac county: Chester A. Fowler, Circuit Judge. *Affirmed.*

On the 15th day of June, 1876, one Henry D. Parsons made a will giving all his property to his wife, Cynthia A. Parsons. The will was kept in a tin box to which no persons had access except the testator and his wife. The box and its contents were on the 5th day of April, 1887, destroyed by a fire which burned the residence of said Parsons. After the destruction of the will, and on the 10th day of November, 1887, Henry D. Parsons and his wife adopted the respondent, *Lafayette R. Parsons.* Henry D. Parsons died on the 22d day of July, 1890, without having executed any other will. On petition of the widow, Cynthia A. Parsons, made in August, 1890, this destroyed will was, on the 5th day of September, 1890, admitted to probate as a lost or destroyed will under sec. 3791, R. S. 1878. At the time the alleged will was probated respondent was a minor of the age of fourteen

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years. The estate of said Henry D. Parsons was administered by Cynthia A. Parsons, and on November 10, 1891, her final account allowed by the court, and the real estate left by the deceased at the time of his death assigned to her.

Lafayette R. Parsons, the adopted son, became of age in July, 1897, and on September 9, 1897, filed a petition in the county court asking that the order of September 5, 1890, admitting the alleged will to probate, be vacated and set aside, a suitable person appointed administrator of the estate, and for general relief. Cynthia A. Parsons, the widow, filed an answer to this petition, and shortly thereafter commenced proceedings in the same court to set aside the proceedings adopting *Lafayette R. Parsons,* which proceedings were litigated through the courts and determined finally on appeal to this court. *Parsons v. Parsons,* 101 Wis. 76, 77 N. W. 147.

Cynthia A. Parsons was afterwards, and in October, 1900, put under guardianship as incompetent, and died on the 7th day of September, 1901. About two months prior to her death she made a will devising her property to strangers, making no provision for her only heir, *Lafayette R. Parsons.* This will was contested by respondent on the ground of incompetency, but admitted to probate by the county court, and judgment affirmed on appeal to the circuit court.

On December 12, 1899, the county court denied the petition of respondent praying that the order admitting to probate the alleged destroyed will of Henry D. Parsons be vacated and set aside, and on February 2, 1900, an appeal was taken from such denial to the circuit court. After appeal to the circuit court a supplemental petition was filed setting up, in addition to the facts in the original petition, the adoption of the respondent, that he was the only heir at law, and praying that the judgment of the county court admitting the will to probate and order assigning the real estate to Cynthia A. Parsons be vacated and set aside, and that, if the order be not set aside, the petitioner be adjudged to be a son of Henry

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D. Parsons born after the making of the will, and entitled to the rights of an after-born child, and for general relief. Notice was afterwards given of motion for leave to file this petition, which was never heard. The executor, *John Balson*, answered this supplemental petition. September 3, 1903, an order to show cause why the appeal to the circuit court should not be dismissed for want of prosecution was made, and an affidavit filed tending to excuse the delay in the prosecution of the appeal, which motion was denied November 18, 1905, and the action ordered revived and continued against the executor.

The action was afterwards tried, and the order of the county court refusing to set aside the probate of the alleged will was reversed, and the proceedings remanded to the county court with direction to set aside the order dated September 5, 1890, admitting the alleged will to probate, and to set aside so much of its order which decided that Cynthia A. Parsons was the sole devisee of Henry D. Parsons, and which assigned the real estate of Henry D. Parsons to her, and that said court by a new order assign the real estate to *Lafayette R. Parsons*, subject to the rights of Cynthia A. Parsons, and for such other relief as might be just upon full consideration of the matters involved, from which judgment this appeal was taken.

For the appellant there was a brief by *Duffy & McCrory*, and oral argument by *J. H. McCrory*. They contended, *inter alia*, that the county court had no power to vacate the order or judgment after the term, except under sec. 2832, Stats. 1898, and that under that statute the motion for such relief must be not only made but decided within the year after notice or knowledge of the judgment to the moving party. *Knox v. Clifford*, 41 Wis. 458; *McKnight v. Livingston*, 46 Wis. 356; *Bloor v. Smith*, 112 Wis. 340; sec. 2832, Stats. 1898; *Whitney v. Karner*, 44 Wis. 563; *Quaw v. Lameraux*, 36 Wis. 626; *Black v. Hurlbut*, 73 Wis. 126; *Main v. McLaughlin*, 78 Wis. 449, 451. The circuit court on appeal had jurisdic-

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tion only to affirm or reverse the order of the county court. It had no jurisdiction concerning the judgment assigning real estate, from which no appeal was taken.

For the respondent there was a brief by *Gary & Forward,* attorneys, and *Charles Barber,* of counsel, and oral argument by *C. H. Forward.*

KERWIN, J. 1. The first error assigned is the refusal of the court to dismiss the appeal for want of prosecution. Sec. 4038, Stats. 1898, provides that, if the appellant shall fail to prosecute his appeal with reasonable diligence, the circuit court, on motion of any person interested, shall dismiss the appeal or affirm the judgment or act appealed from, as such court shall deem just. The question presented here under this assignment of error is whether the court below abused its discretion in refusing to dismiss the appeal. It appears from the record that the appeal was pending for about five years before the motion to dismiss was made, but it also appears from the record and affidavits used on the motion for dismissal that substantial grounds existed for the delay. The time during which the appeal was pending was largely consumed in the litigation of other matters, notably the contest over the adoption proceedings of *Lafayette R. Parsons,* respondent, which contest was litigated through the county and circuit courts and finally determined in this court. It was quite reasonable that the litigation over the adoption of respondent should be finally settled before proceeding with the appeal. There was also litigation over the guardianship of Cynthia A. Parsons, the widow, and a contest over her will; also other litigation and negotiations for settlement, all of which consumed considerable time, as appears from the record, and which was embraced within the period of time now complained of. There was also destruction of papers and other matters referred to by the circuit judge in his opinion as tending to show that there was no unreasonable delay in

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the prosecution of the appeal. Without further discussion upon this branch of the case, we think the showing made upon the motion to dismiss the appeal was amply sufficient to justify the court below in denying the motion. *Cavanaugh v. Scott,* 84 Wis. 93, 54 N. W. 328; *Carberry v. German Ins. Co.* 86 Wis. 323, 56 N. W. 920; *Kropp v. Kropp,* 97 Wis. 137, 72 N. W. 381; *Fleming v. Ellison,* 124 Wis. 36, 102 N. W. 398; *McCann v. Welch,* 106 Wis. 142, 81 N. W. 996.

2. It is further claimed by counsel for appellant that the power of the county court to vacate the order or judgment in question was limited to one year after knowledge of the entry of such judgment or order, and several cases are cited upon this proposition. The general principle of law, as laid down in the authorities cited, does not apply where the order or judgment is attacked on the ground of want of jurisdiction or fraud. The court below found there was both want of jurisdiction and fraud, hence the one-year limitation did not apply. We need not stop to consider whether or not the petition for the probate of the will of Henry D. Parsons as a lost will under the statute was sufficient to vest the county court with jurisdiction, because we are satisfied that the petition presented to the county court asking that the order probating the will be vacated and set aside made a case which entitled the petitioner to relief upon the ground of fraud, and that the finding of fraud is supported by the evidence. The petition showed the execution of the will of Henry D. Parsons June 15, 1876, the birth of respondent July 10, 1876, and his adoption on the 10th day of November, 1887; the destruction of the will April 5, 1887, with the knowledge of Henry D. Parsons, and the survival of said Parsons for a period of three years after the destruction of the will; his failure to make another will, although expressing his intention so to do, and his death on the 22d day of July, 1890; that at the time of hearing on petition to probate the will respondent was a minor about fourteen years of age; that both

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his general guardian and guardian *ad litem* were present at the hearing, but made no objection to the probate of said will, and practically admitted that said destroyed will was the last will and testament of the deceased. It seems very clear that the failure of the guardian *ad litem,* who was appointed to protect the interests of the minor, to make any defense or oppose the probate of the will resulted in the making of the order. It is difficult to believe that, had the matter been properly presented to the county court, such order would have been made. It is quite clear from the record that there was no wilful misconduct on the part of the guardian *ad litem* or any person connected with the proceedings, but it is equally clear that the interests of the minor were left wholly unprotected. It was doubtless a case of failure on the part of the guardian *ad litem* to investigate the questions involved in the litigation, or call the attention of the court to the rights of the infant, and in consequence of such neglect and inattention he suffered the will to be probated, which will gave all the property, after payment of the debts and funeral expenses, to the widow. Upon the undisputed facts the will was not entitled to probate, and the failure of the guardian *ad litem* to call the attention of the court to such fact, therefore, obviously was at least a constructive fraud upon the infant. It was plainly the duty of the guardian *ad litem,* as an officer of the court and occupying a position of trust, to seasonably investigate the questions respecting the infant's rights in the matter and draw them to the attention of the court in order that such rights might be properly protected. *Tyson v. Richardson,* 103 Wis. 397, 79 N. W. 439; *Carty v. Connolly,* 91 Cal. 15, 27 Pac. 599. In *Forker v. Brown,* 30 N. Y. Supp. 827, 828, the court said:

"Fraud, in law, is of two kinds—actual and constructive. The former arises from deception practiced by means of the misrepresentation or concealment of a material fact; the latter, from a rule of public policy, or the confidential or fidu-

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ciary relation which one of the parties affected by the fraud sustained towards the other. It is a constituent of actual fraud that the party alleged to have been defrauded was deceived. *Lefler v. Field,* 52 N. Y. 621. No positive dishonesty of purpose is required to show constructive fraud."

Within about two months after the minor attained his majority he promptly made application to the county court to have the order probating the will vacated, and we think the showing made was ample to warrant the court in taking jurisdiction and vacating the order, although long after expiration of one year from the time of its entry. *Estate of Leavens,* 65 Wis. 440, 447, 27 N. W. 324; *Beem v. Kimberly,* 72 Wis. 343, 39 N. W. 542; *In re Fisher,* 15 Wis. 511; *Estate of O'Neill,* 90 Wis. 480, 63 N. W. 1042; *Clyce v. Anderson,* 49 Mo. 37, 41; *Mills v. Smith,* 19 N. Y. Supp. 854; *Ferguson v. Lowery,* 54 Ala. 510; *In re Steele,* 65 Ill. 322; *Bond v. Lockwood,* 33 Ill. 212; 8 Am. & Eng. Ency. of Law (1st ed.) 647, 648. The point is made by counsel for appellant that fraud is not alleged, but the facts constituting a constructive fraud are alleged, and this is sufficient. Fraud is a conclusion of law. *Crowley v. Hicks,* 98 Wis. 566, 74 N. W. 348.

3. Coming to the merits of the case, the question is whether the court below was right in vacating the order of the county court admitting the will to probate and setting aside the order assigning the real estate to the widow, Cynthia A. Parsons. Although some evidence was offered in the court below, the facts set up in the petition are undisputed and found by the court. The first question arising is whether upon these undisputed facts the alleged destroyed will could be admitted to probate under the statute. It is argued that sec. 3791, Stats. 1898, contains no limitation, and provides that, whenever any will of real estate or personal property shall be lost or destroyed by accident or design, the county court shall have power to take proof of the execution and validity of such

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will and establish the same. But the statute must have a reasonable construction in furtherance of justice and the object of its enactment. The question in all cases of reproduction of destroyed wills under this statute is whether the circumstances of destruction and acquiescence amount to a revocation. It would seem that the rule most consonant with the statute is that if knowledge of the destruction of the lost will be not brought home to the testator within such time as would reasonably enable him to reproduce it, or if he was prevented from so doing, it might be probated upon proper proof of the facts; but where reasonable time elapses after knowledge of the destruction, coupled with opportunity to reproduce the destroyed will, a presumption of revocation arises, and the destroyed will cannot be admitted to probate. In the case before us there is nothing to rebut the presumption of revocation. The destruction of the will three years before the testator's death, with his knowledge, together with the adoption of *Lafayette R. Parsons* after such destruction, revoked the will; hence there was no will which could have been admitted to probate as a lost or destroyed will. *In re Valentine's Will,* 93 Wis. 45, 67 N. W. 12; *Glascott v. Bragg,* 111 Wis. 605, 87 N. W. 853; *Gavitt v. Moulton,* 119 Wis. 35, 96 N. W. 395; *Estate of Deaves,* 140 Pa. St. 242, 21 Atl. 395; Thornton, Lost Wills, § 19.

4. It is further claimed that the court erred in allowing the petition to be amended so as to set up the claim of petitioner as being an after-born child, and asking that the order assigning the real estate of Henry D. Parsons to Cynthia A. Parsons be vacated and set aside. The original petition gave the county court jurisdiction of these matters; hence it was proper to allow the amendment, or the court could have granted the relief without the amendment. *Brook v. Chappell,* 34 Wis. 405. It is also argued that no appeal was taken from the order assigning the real estate. That was clearly unnecessary. The appeal from the judgment refusing to set

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aside the probate of the will brought up the whole matter. The judgment assigning the real estate depended upon the probate of the will, and fell with the judgment setting such probate aside, at least so far as the questions involved upon this appeal are concerned. But it is said that rights vested by limitation under the judgment of probate in the devisees of Cynthia A. Parsons. Such parties, however, are not before this court upon this appeal, and their rights, therefore, cannot be considered. Even if the will were valid and entitled to probate, still, upon the undisputed facts, the respondent would be entitled to the rights of an after-born child, and even upon that phase of the case the judgment of the court below was right. *Glascott v. Bragg, supra; Sandon v. Sandon,* 123 Wis. 603, 101 N. W. 1089. It follows that the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed, and the cause remanded for further proceedings according to law.

CONLIN, Respondent, vs. SOWARDS, Executrix, Appellant.

September 12—October 9, 1906.

Wills: Construction: Life estate or fee? Precatory trusts.

A testator devised land to his wife, subject to the payment of certain legacies, and also devised and bequeathed to her all the residue of his estate, "to have and to hold the same unto her forever." The will then proceeded as follows: "It is my wish that my said wife . . . will so arrange her affairs that whatever property may be left at her death the same will be divided as near equally as possible between my said daughters." *Held,* that these precatory words were advisory only and did not create any trust, and that, subject to the payment of debts, legacies, and expenses, the will gave the property mentioned to the widow absolutely.

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APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

It appears from the record and is undisputed that Daniel Sowards died December 3, 1902, leaving a last will and testament executed April 12, 1901, and the same was admitted to probate by the county court in February, 1903, and an executrix appointed. The executrix having failed to file any account of her administration, and a dispute having arisen over the rights of the respective parties under the will, the plaintiff, as one of the heirs at law and devisees and legatees under the will, filed a petition in the county court February 24, 1905, calling upon the executrix to show cause, if any, why she should not file her account and why the will, and particularly the fifth paragraph thereof, should not be construed by the county court. A hearing was thereupon had, and on September 9, 1905, the county court found and adjudged that the said *Elizabeth L. Sowards* took an absolute estate in the property mentioned in the fifth paragraph of the will, free and clear of any right or claim or interest therein in remainder or otherwise in favor of her daughter *Evelyn A. Conlin* (the plaintiff), and the executrix was not required to file and settle her account of administration. Said daughter duly appealed from that judgment to the circuit court.

At the close of the hearing and trial in the circuit court that judgment of the county court was wholly reversed, and upon the facts, which are undisputed, the circuit court found as conclusions of law, in effect, that the widow and executrix holds the property devised and bequeathed to her by the fifth paragraph of the will in trust to pay the legacies therein mentioned and the costs and expenses of burial and the administration of the estate, and to have the full use, benefit, and enjoyment of the net rents, profits, and income of the residue for life, with remainder over to her two daughters, *Evelyn A.* and Florence E., and that such executrix was by the will vested with a special power in trust and charged with the duty

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of making a division of said remainder at her death, by testament or otherwise, between her said daughters in portions as nearly equal as possible, and that she should be required to render to the county court a full account of her administration of said estate. Judgment was therein ordered accordingly with costs. From the judgment so entered the executrix appeals.

George W. Stephens, attorney, and *F. W. Hall,* counsel, for the appellant, to the point that the presumption, in case of doubtful words, is against a trust, cited *Foose v. Whitmore,* 82 N. Y. 405; *Knox v. Knox,* 59 Wis. 172, 183; *Swarthout v. Swarthout,* 111 Wis. 102.

E. E. Brossard, for the respondent, to the point that the fifth paragraph of the will gives the residue of the estate to the widow in trust, to enjoy the use of the same for life, with remainder to the two daughters, cited *Swarthout v. Swarthout,* 111 Wis. 102; *Knox v. Knox,* 59 Wis. 172; *Jones v. Jones,* 66 Wis. 310; *Littlewood's Will,* 96 Wis. 608; *Derse v. Derse,* 103 Wis. 113; *Webster v. Morris,* 66 Wis. 366, 394; *Tabor v. Tabor,* 85 Wis. 313; *Wolbert v. Beard,* 128 Wis. 391; *Powers v. Powers,* 28 Wis. 659; *Warner v. Bates,* 98 Mass. 274; *Smith v. Bell,* 6 Pet. 68; *Noe v. Kern,* 93 Mo. 367, 6 S. W. 239; Woerner, Adm'n, 874–877; *Harrisons v. Harrisons' Adm'x,* 2 Grat. 1, 44 Am. Dec. 365, 369; *Wood v. Camden S. D. & T. Co.* 44 N. J. Eq. 460, 14 Atl. 885; *Van Dyck v. Van Beuren,* 1 Caines, 84; *Phillips v. Phillips,* 112 N. Y. 197; *People v. Powers,* 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502.

Cassoday, C. J. The testator was eighty-one years of age at the time of executing his last will, and was in poor health and had been for several years. He had by his first wife two children, Marion F. and Ransom J., both of whom are mentioned in that will. He married the defendant, *Elizabeth L.,* in 1863, when he was forty-three years of age and she was

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only twenty years of age. By her he had two children, *Evelyn A.*, born in 1866, and Florence E., born in 1876, and they are both provided for in the will. At the time that will was executed *Evelyn A.* resided with her husband a mile or two from her father's residence and was in the habit of visiting him frequently. Florence E. resided with her husband in a remote part of the state. At the time of making that will *Elizabeth* was fifty-eight years of age and in good health. The best of feeling prevailed among the several members of the testator's family. The testator had made two wills prior to the one in question. In most respects they were quite similar. The first was made December 2, 1893; the second was made January 12, 1897; and the will in question was made April 12, 1901.

By each of the three wills Marion F. was to have $2,200 two years after the testator's death. In each of the three wills it was provided that Ransom J. should have nothing, for the reason therein stated that the testator had already advanced to him his full share of the estate. By his first will he gave to *Evelyn A.* $2,100 payable two years after his death; but by the second and third wills he gave to her a note for $3,000, executed by her and her husband and secured by a mortgage on her husband's land, executed by both of them, and such bequest included the accrued interest thereon. By his first will he gave to Florence E. $2,200 payable two years after his death. In the second will the same amount is given to her, but it is made payable ten years after his death; and in his last will the amount is reduced to $2,000, payable at such time as would best suit the convenience of his wife. In his first will, after the payment of his debts and legacies, he gave, devised, and bequeathed to his wife "all the rest, residue, and remainder" of his estate, "*with the request and direction* that, whatever property *may be left* after the death of my said wife, it shall descend, share and share alike, to my children, Marion F. Sowards, *Eva Conlin,* and Florence

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Sowards." In his second will he gave his life insurance to his wife to be used in paying his debts and legacies; and then, after requiring his wife to pay his debts and the legacies mentioned, he devised to his wife his farm, "consisting of 220 acres, the same to be used, held, and enjoyed by my said wife during the term of her natural life, and after her death the same to descend, go to, and belong to my said daughter Florence Sowards." At the time that will was executed, Florence E. was less than twenty-one years of age and unmarried, and the testator was seventy-seven years of age.

It appears that George W. Stephens, of Columbus, Wisconsin, who appeared as attorney for the estate in the probate of the will, drew each of the three wills and witnessed each of them. This being so, the broad difference in the language used in the provisions for the widow in the will in question and such provisions in the two former wills would seem to indicate a different purpose in the mind of the scrivener, if not in the mind of the testator. The language of such provision in the last will and here to be construed is as follows:

"*Fifth.* I give, devise, and bequeath to my beloved wife, *Elizabeth L. Sowards,* my farm of 217½ acres of land situated in Hampden, Columbia county, Wisconsin, which said farm is subject, however, to the payment of the legacy to Marion F. Sowards and the legacy to Florence E. Stewart above mentioned. And I also give, devise, and bequeath to my said wife, *Elizabeth L. Sowards,* all money derived on my life insurance policy, all of my stock on the farm, and all my farming utensils, and *all* the rest, residue, and remainder of my estate *of every kind and nature whatsoever and wheresoever* the same may be situated. To have and to hold the same unto the said *Elizabeth L. Sowards forever. It is my wish* that my said wife *Elizabeth L. Sowards will so arrange her affairs* that whatever property *may be left* at her death the same *will be divided* as near equally as possible between my said daughters *Evelyn A. Conlin* and Florence E. Stewart."

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Of course, we are not called upon to consider the intention of the scrivener, but only the intention of the testator as evinced by the language employed by the scrivener in the will here in question. The friendly feeling which prevailed among the several members of the testator's family, and his deep affection for all his children, as found by the trial court, seem to be manifest from the wills themselves, when considered in connection with the changes which took place from time to time in the family. The bequests to the several children by the first will seem to have been substantially equal, followed by a residuary clause giving all the residue of his property to his wife for life, with the remainder to three of his children therein named, omitting Ransom J., to whom, as therein stated, he had theretofore given "property equal in amount to the sum" therein given to his other children respectively. The only substantial changes in the second will from the first were in respect to the gifts to *Evelyn A.* and Florence E. and the residuary bequest. Such changes in the will seem to have been suggested by changes which had taken place in the situation of the parties. *Evelyn A.* had been married for several years and had three children. At first she and her husband lived with the testator's family for a part of a year. Then they went to Minnesota for about a year. Then they came back and worked the testator's farm for three years. Then they bought from the testator and moved onto a farm of 120 acres and gave back to him the note and mortgage for $3,000 mentioned in the second and third wills. That farm was only a mile or two from the testator's home, and *Evelyn A.* was in the habit of visiting her father and mother frequently. That left Florence E. the only child remaining at home with her parents. As indicated, she was, at the time that the second will was executed, less than twenty-one years of age and unmarried, and, manifestly to induce her to remain at home with her mother, the time of the payment to her of the legacy

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mentioned in the first will was extended from two years after his death to ten years after his death, and the farm was devised to the "wife during the term of her natural life," and then after her death to Florence E. as sole residuary devisee.

During the four years and over between the making of that second will and the making of this last will Florence E. got married and moved with her husband to a remote part of the state and had one child. Her husband had a good business and was in fair financial circumstances, and they were in a condition to have a good living. Such marriage and removal of Florence E. left the testator and his wife alone at home. The testator was in very poor health for ten years prior to his death. For three or four years prior to his death his condition was such that he was unable to get out of the house during the winter. His wife transacted the business when he was sick. Undoubtedly, the facts mentioned induced the testator to execute the will in question April 12, 1901. The only substantial change between that will and the one made four years and three months before was in relation to the provisions for the wife. The testator was then eighty-one years of age and manifestly expected soon to pass away, and then his wife would be left alone. Unless it was the purpose of the testator to make a more certain and substantial provision for his wife therein than by his former will, then it would seem to have been without significance. If by the provision of the will above quoted she only took the property therein devised and bequeathed to her *in trust* to pay legacies and expenses, and "to have the full use, benefit, and enjoyment of the net rents, profits, and income of the residue for life, with remainder over," as held by the trial court, then she got nothing thereby which she would not have received under the second will, had the same never been revoked. Nevertheless, if the provision of the will above quoted requires such a construction, then it

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should be so construed regardless of its futility. Of course, the important thing is to ascertain and give effect to the intentions of the testator as expressed in or implied from the language of his will. That language is very sweeping. He first devised the farm to his wife subject to the payment of legacies. He then gave, devised, and bequeathed to her all money derived from life insurance, all of his stock, all of his "farming utensils and all the rest, residue, and remainder" of his "estate of every kind and nature whatsoever and wheresoever the same" might "be situated—to have and to hold the same unto the said *Elizabeth L. Sowards forever.*" Under our statutes the absence of words of inheritance is of no significance. Secs. 2206, 2278, Stats. 1898; *Baker v. Estate of McLeod,* 79 Wis. 534, 545, 48 N. W. 657. He also nominated her as executrix, and therein directed that she should not "be required to give bonds for the faithful performance of said trust as executrix," and thereby revoked all former wills by him made.

The question recurs whether the intention of the testator, as thus expressed, was modified or limited by the declaration contained in the will to the effect that it was his *"wish"* that his wife would "so arrange *her affairs* that whatever property" might "be left at her death the same" would "be divided as near equally as possible between" his said daughters. The *"wish"* expressed was as to what the wife would do in arranging her own affairs. Of course, if the wife took an absolute title to the property, subject to the payment of debts, legacies, and expenses, and never should dispose of the same by will or otherwise, then whatever would be left at her death would descend to the two daughters in equal shares. We are not aware of any well-considered adjudication holding that such mere "wish" of the testator that an executor or executrix would "arrange her affairs" or property in some prescribed way has been held to be mandatory.

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In *Smith v. Bell,* 6 Pet. 68, 70, 75–77, seemingly relied upon by the trial court, the testator, after the payment of his debts, legacies, and expenses, gave and bequeathed to his wife all his personal estate "to and for her own *use and benefit* and disposal absolutely; the *remainder* of said estate, after her decease, *to be for the use of the said Jesse Goodwin,*" his son. In construing this language the learned chief justice said:

"In the will under consideration but two persons are mentioned—a wife and a son. The testator attempts, in express words, to make a provision for both out of the same property. The provision for the wife is immediate; that for the son is to take effect after her death. . . . It must be admitted that words could not have been employed which would be better fitted to give the whole personal estate absolutely to the wife, or which would more clearly express that intention. But the testator proceeds: 'The remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin' [his son]. These words give the remainder of the estate, after his wife's decease, to the son, with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son, as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. . . . We are no more at liberty to disregard the last member of the sentence than the first."

In *Knox v. Knox,* 59 Wis. 172, 175, 177, 178, 18 N. W. 155, 157, also seemingly relied upon by the trial court, the clause of the will construed, omitting nonessentials, was this:

"I give, devise, and bequeath unto my wife . . . her heirs and assigns forever all my real and personal estate . . . having full confidence in my said wife, and hereby *request* that at her death she will divide equally, share and share alike, in equal portions as tenants in common, between my sons and daughters . . . *all the proceeds* of my said property, real and personal, goods and chattels, hereby bequeathed."

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The opinion of the court, written by Mr. Justice TAYLOR, is quite lengthy, reviewing the authorities, including *Smith v. Bell, supra,* and, among other things, he said:

"The two important questions to be considered in the construction of the provisions of the will above quoted are: First, has the testator in his expressed request in said will clearly pointed out the persons whom he desired should be the recipients of his bounty, and has he clearly defined the part of his estate which he desired they should receive? And, second, does the language used by him clearly show that he intended it to be obligatory upon his wife, to whom he had devised all his property in fee, and not merely advisory? . . . In order to determine whether precatory words in a will create a binding trust, 'the real question always is whether the wish, desire, or recommendation expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion.' . . . The words used by the testator in describing the property *he requests should go* to his children after the death of his wife are 'all the proceeds of my said property, real and personal, hereby bequeathed.' "

And so the court held:

"The words 'all the proceeds,' etc., mean the entire body of the estate, subject to such sales and conversions thereof as necessity or the interest of the parties might require."

The principles thus announced by Mr. Justice TAYLOR were fully recognized and enforced in *Tabor v. Tabor,* 85 Wis. 313, 55 N. W. 702, where "a testator, after giving to his wife his entire estate, 'the real estate in fee simple and the personal estate by a like absolute ownership,' proceeded: 'I do this in full trust and confidence that she will provide for the distribution of the same by her last will and testament among our children [naming them] in such proportions as shall be just and right; but this expression of trust and confidence is not to be interpreted as limiting her right of owner-

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ship or power of distribution.' " And it was held "that the precatory words were advisory merely, and no trust was created."

The principles announced in both of those cases are fully recognized in a later case in this court. *Swarthout v. Swarthout,* 111 Wis. 102, 108–111, 86 N. W. 558, 560, 561. It was there said: "Every case stands upon the evidence of the testator's intention, arising out of each will." In that case particular stress was placed upon the expressed desire of the testator that the property and estate "devised, or so much thereof" as his wife might "be possessed of at her decease, shall go to or be by her given to our child or children, if any there be then living."

In a recent case decided in the New York court of appeals the testator gave his residuary estate to his wife, provided, however, that, if any part thereof remained unexpended or undisposed of at her death, such remainder he gave to his son, and added this clause: "And I expect and desire that my said wife will not dispose of any of said estate by will in such a way that the whole that might remain at her death shall go out of my own family and blood relation." *In re Gardner,* 140 N. Y. 122, 126, 35 N. E. 439, 440. The widow died leaving a will by which she gave a large portion of such remainder to the son and the balance to a sister. The court "held that the power to dispose given by the will included the right to dispose by will; that the estate of the wife was not qualified by the concluding paragraph expressing the testator's expectation and desire; also that, if that clause should be construed as implying a power in trust in favor of the son, the power was observed and fully executed." Id.

In a more recent case in that court it was held: "Where there is an absolute gift of real or personal property, in order to qualify it, or cut it down, the latter part of the will should show an equally clear intention to do so, by the use of words definite in their meaning, and by expressions which must be

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regarded as imperative." *Clay v. Wood,* 153 N. Y. 134, 47 N. E. 274. See, also, *Collister v. Fassitt,* 163 N. Y. 281, 288, 296, 57 N. E. 490.

Upon reason and authority we must hold that, subject to the payment of debts, legacies, and expenses, the testator, by virtue of the portion of the will above quoted, gave, devised, and bequeathed to his wife his farm and all the money derived from his life insurance, all his stock, all his farming utensils, and all the rest, residue, and remainder of his estate of every kind and nature, to have and to hold the same forever.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to transmit the record to the county court for further proceedings in accordance with this opinion. The taxable costs of both parties in this court are payable out of the estate.

MERRELL, Appellant, vs. PURDY and wife, Respondents.

September 12—October 9, 1906.

Married women: Promissory notes: Separate property: Estoppel.

A married woman, though possessing separate property, is not liable in an action at law upon a promissory note signed by her with her husband, where it was not given for the purchase price of any property bought or received by her, was not in any way necessary or beneficial to the management or enjoyment of her separate property or business, and did not relate to her personal services, and where there were no facts creating an estoppel.

APPEAL from a judgment of the circuit court for Columbia county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an action at law upon a joint and several promissory note for $3,000 given by the defendants, who are hus-

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band and wife, to the plaintiff August 28, 1901, payable one year after date. The defendant *Helen M. Purdy* defended on the ground that the debt represented by the note was her husband's debt and that she signed the note as accommodation maker only. The case was tried before the court and a jury, and the following facts were practically undisputed:

Prior to the year 1876 the defendant *E. S. Purdy* and one Henry Merrell (father of the defendant *Helen M.*) were partners in the drug business at Portage, Wisconsin, and borrowed $3,000 of one Weir, for which they gave the firm note. Henry Merrell died in 1876 (the Weir note being still unpaid), leaving a will, which was duly probated, in which will he made a specific bequest of $3,000 to Gordon H. Merrell, his brother and the husband of the plaintiff, and bequeathed the residuum of his estate, after payment of specific bequests, to his three children, of whom *Helen M.* was one. The date of the settlement of the estate does not appear, but it is admitted that *Helen M.* received some property under the will prior to January, 1883, and invested it in business real estate in the city of Portage. In December, 1876, the executors of the Merrell estate, of whom *E. S. Purdy* was one, took $3,000 from the estate and took up the Weir note and turned it over to Gordon H. Merrell upon his legacy. Whether this was received by Gordon temporarily as security or permanently in payment of his legacy is disputed. Gordon held the Weir note until January 9, 1883, *E. S. Purdy* paying the interest regularly, at which time the defendants executed and delivered their joint and several note to Gordon for $3,000 and the Weir note was surrendered. Gordon Merrell died in 1888 and the plaintiff, as his heir at law, became the owner of the note. *E. S. Purdy* paid the interest regularly, and in August, 1901, the defendants gave to the plaintiff the note in suit to take up the note of 1883. Upon this note interest was paid by *E. S. Purdy* up to June 1, 1905, when the pay-

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ments ceased and this action was brought. In 1882 the defendant *Helen M. Purdy* commenced the erection of a store building on her lot in the city of Portage, and the plaintiff claims that at some time in the spring of that year *E. S. Purdy* came to her husband and stated that *Helen* could not build her building unless he would lend her the money represented by the Weir note, and that the note of 1883 was executed in pursuance of that conversation. The conversation was denied by *E. S. Purdy* and there was no proof that *Helen* had any knowledge of it. There was also evidence offered by the plaintiff to the effect that in 1899 the defendant *Helen* stated to one Miss Pettibone, who represented the plaintiff, that her husband had transferred his stock in the drug business to her so that his creditors could not trouble him, but that she considered *Mrs. Merrell's* debt sacred. This conversation was denied by *Mrs. Purdy*. The court submitted to the jury questions for a special verdict, which with their answers are as follows:

"(1) Did the defendant *E. S. Purdy* represent to the plaintiff and to her husband, before the note of January 9, 1883, was executed, that the defendant *Helen M. Purdy* could not put up her building unless the note of January 9, 1883, was accepted in place of the Weir note? *A.* Yes. (2) Did the defendant *Helen M. Purdy* in 1899 represent to Miss Pettibone, representing the plaintiff, that the property of the defendant *E. S. Purdy* had been transferred to her for the purpose of avoiding claims against him? *A.* Yes. (3) If your answer to the second question be 'Yes,' then did the plaintiff rely upon such representation when she accepted the note of August 28, 1901? *A.* Yes."

The plaintiff moved for judgment on the special verdict against *Helen M. Purdy,* which motion being denied she moved to set aside the verdict and for a new trial, which motion being also denied, judgment was rendered against the defendant *E. S. Purdy* for the amount of the note with costs, and in favor of the defendant *Helen M. Purdy* against the

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plaintiff without costs. From that part of the judgment in favor of *Helen M. Purdy* the plaintiff appeals.

Daniel H. Grady, for the appellant.

For the respondents there was a brief by *J. H. Rogers* and *A. H. Blatchley,* and oral argument by *Mr. Blatchley.*

Winslow, J. The question presented is the question as to the liability of a married woman upon a promissory note in an action at law. The principles governing the contracts of married women are fairly well settled in this state and may be briefly stated as follows: (1) A married woman, whether possessed of a separate estate or not, may purchase property, real or personal, and give her obligation for the purchase price, which obligation will bind her at law as if she were a *feme sole,* provided the title of the property purchased passes to her; and this she may do regardless of the purpose to which she intends to devote such property. *Kriz v. Peege,* 119 Wis. 105, 95 N. W. 108. (2) A married woman possessed of a separate estate or business, or who is rendering personal services to some person other than her husband, may make all contracts necessary or convenient for the management or enjoyment of the estate or the carrying on of the business, or relating to her personal services, and such contracts will be enforceable at law. *Mueller v. Wiese,* 95 Wis. 381, 70 N. W. 485; *Ritter v. Bruss,* 116 Wis. 55, 92 N. W. 361. (3) A married woman possessing separate property may bind herself at law by estoppel. *S. D. Seavey Co. v. Campbell,* 115 Wis. 603, 91 N. W. 655. (4) A married woman may by proper instrument charge her separate property for any obligation, even for her husband's debt, but this charge is only enforceable in equity. *Mueller v. Wiese, supra; Hollister v. Bell,* 107 Wis. 198, 83 N. W. 297; *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423.

It is only necessary to apply these propositions to the undisputed facts of the present case to arrive at a conclusion as

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to the correctness of the judgment. It will be at once seen that the fourth proposition has no possible application to the case as there was no attempt here to charge *Mrs. Purdy's* separate estate, and the action is a straight action at law to enforce a legal liability. It is equally apparent that the first proposition does not apply because *Mrs. Purdy* neither bought nor received any separate property when she signed the note of 1883 or the renewal note of 1901.

This leaves only the second and third propositions to be considered. At the time of the execution of the joint note in 1883 *Mrs. Purdy* had a separate estate composed of the store building and lot, and possibly some remaining interest in the residuum of the estate of Henry Merrell, although the evidence leaves this latter element in doubt. Assuming such to be the fact, however, it is impossible to see how the execution of that note by *Mrs. Purdy* was in any way necessary or beneficial to the management or enjoyment of any of her property. The evidence is positive and uncontradicted that none of the money represented by that note went into her real estate. True, there is evidence that *Mr. Purdy* in 1882 represented to Gordon Merrell that *Mrs. Purdy* could not build her building without it, but there was no evidence that she authorized such representation, and, as said before, the evidence was uncontradicted that it did not, in fact, go into the building. Did the giving of that note in any way benefit or conserve her residuary interest in the estate of Henry Merrell? The answer to this question depends upon whether Gordon Merrell had released his claim for the $3,000 legacy prior to the execution of the note or whether he released it in consideration of such execution. If that claim had previously been released, then it is plain that the estate could in no way be benefited by the subsequent execution of the note. The written release was not found and the evidence does not fix its date. Two witnesses testified as to the time it was given, viz., *Mr. Purdy* and the plaintiff. *Mr. Purdy* testifies that it was

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given, he thinks, in December, 1876, and the plaintiff testifies that it was given in the spring of 1882. There is absolutely no testimony that it was given at any later date or in consideration of the execution of the note of 1883; hence there is no room for a claim that the estate of Henry Merrell received any benefit by the execution of the note. The second proposition, therefore, has no application to the case.

The claim of estoppel is equally untenable. Accepting the answers of the jury in the special verdict as true, no estoppel is shown. The representation found to have been made by *Mr. Purdy* was not authorized by *Mrs. Purdy,* nor was it shown to have caused any change of position on the part of Gordon Merrell. The representation made by *Mrs. Purdy* in 1899 as to the transfer of her husband's property to her was followed by no change of position on the part of *Mrs. Merrell.* The new note was simply a renewal of the old. No security was surrendered or lost by *Mrs. Merrell* by reason of this renewal, nor was there any change of position.

The view we have taken of the case renders immaterial any discussion of the rulings upon evidence.

By the Court.—Judgment affirmed.

SMITH, Respondent, vs. CITY OF BURLINGTON and others, Appellants.

September 13—October 9, 1906.

Municipal corporations: Acquiring steam or water power for lighting plants, etc.: Vote of electors: Construction of statutes: Constitutional law: Classification of cities: Injunction: Extent.

1. Sec. 1, ch. 95, Laws of 1901, in terms grants to cities of the fourth class power to purchase, lease, or construct steam power or water power for the purpose of maintaining and operating lighting plants and waterworks. Sec. 2 provides that the power

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granted in sec. 1 shall be exercised only when ratified by a two-thirds vote at a special election. Construing said act in the light of other legislation on the general subject, it is *held* that, even if the power in terms granted by sec. 1 existed under prior statutes, it is subject to the condition imposed by sec. 2.

2. The exercise of the power mentioned is equally subject to said condition whether the attempt be to acquire the steam or water power as a separate undertaking or as incidental to or a part of a general plan for construction of a lighting plant or waterworks.

3. Where the words of a statute are plain and unambiguous and not absurd, courts must be guided thereby, and not by extrinsic facts and circumstances, in ascertaining the legislative intention.

4. A statute not applicable to larger cities, but requiring in cities of the fourth class the approval of the electors by a two-thirds vote for acquiring steam or water power for light or water supply, does not involve an improper classification of cities on a basis not germane to the subject of the act.

5. An injunctional order restraining a city of the fourth class from entering into any contract or issuing any bonds for the construction of an electric lighting plant pursuant to proceedings set forth in the complaint, which proceedings involved the acquisition of steam or water power for such plant in violation of ch. 95, Laws of 1901, is *held* not so broad as to bar the commencement of new proceedings for the establishment of a lighting system which did not include the acquisition of steam or water power.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action brought by a taxpayer to enjoin the city and its officers from entering into a contract for the construction of an electric lighting plant pursuant to proceedings theretofore had and from issuing or negotiating bonds therefor and from collecting taxes pursuant to an ordinance to meet such bonds. It appears on the pleadings that the defendant city is a city of the fourth class, existing under ch. 40*a*, Stats. 1898; that in May, 1895, the council adopted certain plans and specifications for an electric lighting plant for lighting the streets of said city, which included the erection and construction of a steam power plant to operate the same as a part of the en-

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tire plan. Thereupon, by ordinance, provision was made for the issue and sale of $12,000 of city bonds for the purpose of constructing such electric lighting works; such issue of bonds to be made only after a special election to approve the same. A special election was held upon the single question of issuing bonds, and a bare majority of the votes cast were in favor thereof, much less than two thirds. Thereupon an ordinance was enacted levying taxes to meet the principal and interest of the bonds, namely, $2,200 for the year 1906, and substantially equal instalments for each of the succeeding years to 1911. The mayor and city clerk were directed to advertise for bids for said bonds, and also for bids for constructing the electric light plant in accordance with said plans and specifications, and they intended and threatened to proceed so to do.

Upon complaint and answer showing substantially the foregoing facts, preliminary injunctional order was made enjoining the defendants to "desist and refrain from awarding or entering into any contract for the purchase of material or machinery, or for the erection and construction of an electric lighting plant in the city of *Burlington* pursuant to the proceedings heretofore had therefor, as set out in the complaint; and from awarding, issuing, or negotiating the corporate bonds of said city of *Burlington* for the purpose of paying for, erecting, or constructing such electric lighting plant;" also from entering upon the tax roll or collecting any assessment or tax for the principal or interest of such bonds. After due hearing upon notice of motion to vacate or modify such restraining order, such latter motion was denied, from which order of denial the defendants bring this appeal.

For the appellants there was a brief by *E. John Wehmhoff*, attorney, and *Jones & Schubring*, of counsel, and oral argument by *Mr. Wehmhoff* and *Mr. E. J. B. Schubring*.

For the respondent there was a brief by *Waller & Gittings*, attorneys, and *John B. Simmons*, of counsel, and oral argument by *Mr. Simmons*.

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DODGE, J. This case presents another of the labyrinthian complications which the various legislative acts have thrown around the subject of the establishment of municipal waterworks and lighting plants and the incurring of municipal indebtedness therefor, many of which were so impressively set forth in *Appleton W. W. Co. v. Appleton,* 116 Wis. 363, 93 N. W. 262. The statute now presented was not mentioned or considered in that case. It is ch. 95, Laws of 1901, and provides, by sec. 1, that every city of the fourth class "is hereby authorized and empowered to purchase, lease or construct steam power or water power for the purposes of maintaining and operating for public use lighting plants and waterworks." Sec. 2 provides that the authority and power granted in sec. 1 shall be exercised only when ratified by a two-thirds vote at a special election, with proviso that no such exercise of the power shall require the expenditure of a sum greater than three per cent. of the taxable property in any one year. It is urged by the appellants that under various existing provisions of statute cities of the fourth class had, prior to this act, full power and authority to erect and establish lighting plants, and, as an incident and element thereof, to purchase, lease, or construct either the steam or water power necessary to operate the same, and that no such power or authority was granted or conferred by the act of 1901, from which they argue that the restrictions imposed by sec. 2 of that act, applying only, as they do, to the power and authority granted by the first section, have no application to a power formerly existing and not so granted. This argument is not unlike one that was made and refuted in the *Appleton Case.* It is by no means an unusual form for statutes to, in terms, make a grant of power which already exists, and then to impose restrictions or regulations upon the exercise of that power, meaning no more by the apparent grant than to define the power upon which it is proposed to impose such restrictions and regulations; the latter constituting the whole pur-

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pose of the act, and the first section, in terms a grant, being only adopted as a convenient method of definition of that to which the second section should apply. After examination of this act in the light of the various other legislation on the general subject, we are convinced that such was the purpose of ch. 95, Laws of 1901, and that, whether or not the first section did confer any new power, the second section imposed a condition of a two-thirds vote upon the exercise of the power to lease, purchase, or construct steam or water power for the purposes of maintaining and operating lighting plants or waterworks.

But here, again, the appellant urges that, in the light of existing powers and of some facts in the history of this enactment, this law should be read as only placing limitations upon an attempt by a city to acquire steam or water power as separate undertaking distinct from a general proceeding to construct a system of municipal lighting or waterworks; pointing out the probability that there were cities in the state already owning such plants but dependent for their operation upon power owned by others, or cities which desired to avail themselves of an opportunity to acquire such power before they were prepared to enter upon the construction or acquisition of a system of lighting or waterworks, and as anticipatory thereto. It may be that some such limited purpose was in the minds of the legislators; but, where words are plain and not absurd, courts must be guided thereby, and not by extrinsic facts and circumstances, in ascertaining the legislative intention. In the statute before us there is nothing of ambiguity in the declaration that ratification by a two-thirds popular vote must be had as a condition of the exercise by the city of the power to purchase, lease, or construct steam or water power, and there is no word to suggest an exception in case such power is attempted to be acquired as incidental to or a part of a general plan for construction of lighting or water works. We deem ourselves bound to give

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effect to these plain words without searching for some legislative purpose other than they express, and to hold that the action of the defendant city in this case, in proceeding to let contracts and issue bonds for the construction and acquisition of steam power to run a lighting plant, was forbidden by law, although such contract also included the construction of the lighting system.

Appellant argues that, as we construe the act of 1901, it is unconstitutional, because involving a classification of cities according to population, which, as argued, presents no distinction germane to the legislation. The general propriety of the classification of municipalities according to population for the purpose of conferring different powers and imposing different restrictions has been asserted so many times and so uniformly by this court that we need but refer to some of our prior decisions: *Land, L. & L. Co. v. Brown,* 73 Wis. 294, 40 N. W. 482; *Johnson v. Milwaukee,* 88 Wis. 383, 60 N. W. 270; *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 98 N. W. 954; *Bingham v. Milwaukee Co.* 127 Wis. 344, 106 N. W. 1071. Nevertheless, each new piece of legislation involving this classification presents again the question of relationship between its subject and the distinction between the larger and denser community and the smaller one; not whether such distinction renders the variance in legislation wise, but whether any reasonable mind can conceive relationship between them. The effect of the statute attacked is to require popular approval for acquiring steam or water power for light or water supply more completely in the small city than in the large one. Much legislation, from the earliest days, has assumed the legitimacy of such distinction. Many steps involving the making of public improvements and consequent incurring of pecuniary burdens are required to receive the sanction of the electors in towns, but not in cities. Many things may be done by the supervisors of towns containing

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unincorporated villages of 1,000 population, which in other towns must be voted at the town meeting. So, throughout the statutes regulating cities, we find different limitations according to the classes as to the powers of the government in the field of public improvements and the necessity of approval by the electors. We think very obvious relationship may be discovered between the size of a city and the propriety of burdening it with the cost of acquiring and maintaining so expensive plants as for light and water with power plants sufficient to operate them. Such plants are of much more doubtful necessity and prosperity to the small city than to the large. They involve much more of speculation and experiment. Expenses of operation, especially of competent superintendence, are likely to be proportionately greater. These and other considerations suggest the propriety of submitting the questions directly to those who must ultimately bear the burden of any mistake or failure. Again, as suggested by respondent's counsel, the comparative ease of submission of a question to a small electorate, and the greater attention ordinarily paid to municipal affairs, might well have been considered a legitimate reason for confining such a law to the smaller cities. We are not able to assert that the legislature could not have found reasons appealing to it as cogent for requiring a two-thirds popular vote in cities of the fourth class not equally necessary in larger cities, and therefore cannot declare beyond reasonable doubt that this enactment transcends the legislative power.

Some contention is made that the injunctional order is too sweeping and restrains the city from doing acts in the way of establishment of a system of poles, wires, and electric lights, independently of the acquisition or construction of steam or water power therefor; for which action it is contended no two-thirds popular vote is required. The temporary injunction merely restrains the city from entering into any contract for material or construction of an electric

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lighting plant "pursuant to the proceedings heretofore had" as set forth in the complaint, and from issuing or negotiating bonds for the construction of said electric lighting plant "pursuant to the proceedings had therefor as set out in the complaint," and from collecting any taxes for the purpose of paying the interest or principal of such bonds. It appears, without dispute, from the proceedings, that the only plan upon which the council has acted or the public voted is a single complete plan including the construction of a steam power plant, and the only resolution for the issue of bonds is to supply money for that entire purpose, and it is obvious that the present injunctional order does not go beyond prevention of steps injurious to the plaintiff as a taxpayer in pursuance of a definite and declared plan which, as we have already said, is unlawful and beyond the power of the city. If the purpose is forbidden, the raising of money therefor either by taxation or the issue of bonds is illegal. We deem it entirely plain that the present injunctional order could be no bar to commencement of new proceedings for the establishment of a street lighting system which did not include the construction or acquisition of a steam or water power plant.

By the Court.—Order appealed from is affirmed.

SEIFEN, Respondent, vs. CITY OF RACINE, Appellant.

September 13—October 9, 1906.

Judgment: Res judicata: *Amendment of pleading: Immaterial error: Officers: Policemen: Attempted removal: Validity of appointment: Abandonment of office: Right to salary.*

1. A judgment against the validity of the summary removal of a policeman from office, rendered in *certiorari* proceedings wherein no question as to his original appointment was considered, does not render the validity of such appointment *res judicata.*

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2. Refusal to allow a proper amendment of an answer was not a prejudicial error, where evidence was admitted as though the amendment had been made; and on appeal it will be deemed to have been made.
3. The evidence in this case—showing, among other things, that plaintiff performed the duties and was paid the salary of a policeman for a certain period; that he had theretofore, after examination by the police commission, been placed upon the eligible list; that a certificate approving his appointment, executed for the commission by its secretary, had been filed with the city clerk; and that he had duly qualified before entering the service—is *held* sufficient to show due appointment to the office of policeman.
4. Upon receiving notice of removal from office, believing he had been legally discharged, a policeman delivered to the city such articles of property as it had furnished to him for use in the performance of his duties, but upon obtaining advice of counsel that the attempted removal was invalid he commenced proceedings to test its validity. *Held*, that he had not acquiesced in the removal or surrendered or abandoned the office.
5. Shortly after an attempted removal of plaintiff from the office of policeman, other policemen were appointed, but to none of such new men were assigned the duties which plaintiff had performed, such duties being performed by an older member of the force. The salary attached to plaintiff's office was $65 per month, and the new appointees received each $55 per month. *Held*, that no other person was performing the duties and receiving the emoluments of the office to which plaintiff had title, and that for the time during which he was unlawfully prevented from performing such duties he was entitled to recover the salary of the office.

Appeal from a judgment of the circuit court for Racine county: E. B. Belden, Circuit Judge. *Affirmed.*

An action to recover the salary which plaintiff alleges is due him as policeman of the city of Racine from February 1, 1905, to July 1, 1905, at the rate of $65 per month. It appears that plaintiff had been performing the services of a policeman for the city from March 1, 1900, to the 1st day of February, 1905, under an alleged appointment, and that he had received the compensation of a policeman. On January 23, 1905, by letter from the secretary of the police and

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fire commission, plaintiff's resignation was requested, to take effect the ensuing February 1st. He disregarded the request. On January 28th he received notice, signed by the members of the commission, that he had been removed from the police department, and that the removal would take effect February 1st following. He thereupon left his keys and other belongings of the city at the police office, in the belief that they could be demanded of him after the notice given him. He was at that time of the opinion that he could not demand to be kept in the actual employ and the performance of the service of policeman. He thereafter consulted counsel and, pursuant to their advice, in May, 1905, he commenced *certiorari* proceedings to test the legality of the commission's action in summarily removing him. On July 5, 1905, the court decreed that the attempted removal of the plaintiff from his office of policeman was illegal, and declared the action for naught. Other proceedings were taken, and by this second proceeding plaintiff was regularly suspended and removed by the commission from and after July 1, 1905. Plaintiff was not assigned to perform any police duty from February 1 to July 1, 1905. The police and fire commission and the chief of police appointed policemen immediately after plaintiff had been notified of his summary removal on January 28, 1905, and they qualified and entered upon the performance of police duties for the city. The persons so appointed received a compensation of $55 per month. So far as appears, no person was appointed in the plaintiff's place, and the services on the particular beat which plaintiff had performed on and before he received the notice on January 28, 1905, were thereafter performed by a member of the police force who had been in the service for a considerable time before plaintiff was notified to quit the service.

The court found that from February 1 to July 1, 1905, plaintiff was a duly appointed and qualified police officer of

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the defendant city; that the emoluments attached to the office consisted of a salary of $65 per month; that the attempted removal of the plaintiff from this office by the police and fire commission on January 28, 1905, had been declared by judgment of the court to be illegal and ineffectual, and that such judgment was still in force; that no person had been appointed to fill the office, and that from February 1 to July 1, 1905, no person occupied the office of policeman held by this plaintiff; that the action of the city, through its chief of police and the police and fire commission, prevented plaintiff from performing the actual service of this office for this period; and that plaintiff at no time had resigned, surrendered, or abandoned the office so held by him. Upon this state of facts the court held that plaintiff was entitled to judgment for the amount of the salary attached to the office, with interest from the time the monthly instalments were due and payable. This is an appeal from such judgment.

For the appellant there was a brief by *E. R. Burgess,* city attorney, and *M. E. Walker,* of counsel, and oral argument by *Mr. Walker* and *Mr. Roy Burgess.*

For the respondent there was a brief by *Thompson & Harvey,* attorneys, and *C. C. Gittings,* of counsel, and oral argument by *Fulton Thompson.*

Siebecker, J. The defendant asked leave to amend its answer, at the beginning of the trial of the case, by denying that plaintiff had ever been appointed a policeman for the defendant city as alleged in the complaint. The court held its ruling on this motion in abeyance, but permitted proof to be received as if an issue had been raised as to this question, and at the time of making its decision held the amendment unnecessary, upon the ground that this issue was covered by the judgment in the *certiorari* proceeding. That proceeding, however, does not show that any question was adjudicated except the one as to the sufficiency of the proceeding for the re-

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moval of the plaintiff from the office of policeman, instituted January 28, 1905, by the police and fire commission. The question of plaintiff's original appointment to the office seems not to have been tried or considered in that proceeding, nor was it necessarily involved in passing upon the question then expressly determined by the court. Under these circumstances the judgment in that case upon that question is not *res adjudicata* in this case. *Lindemann v. Rusk,* 125 Wis. 210, 104 N. W. 119, and cases cited. Defendant's amendment should have been allowed; but, since the proof was received as if the issue had been raised, no prejudicial error was committed, and the answer will be deemed so amended on this appeal. *Gill v. Rice,* 13 Wis. 549; *Nelson v. Campbell & C. Co., ante,* p. 82, 107 N. W. 297.

It is urged that the evidence does not show that plaintiff was appointed a policeman as alleged. It appears that he entered the city's service as a policeman on the 2d day of March, 1900, that he performed the duties of that office until February 1, 1905, and that he was paid the salary attached to the office. It is contended that his appointment was not valid because the police and fire commission failed properly to approve it. Their action is evidenced by a certificate reciting that the board approved the appointment. This was executed for the board by the secretary of the commission and was filed in the office of the city clerk. It also appears that, after an examination to test his qualification, plaintiff had been placed on the list of the board as eligible to appointment in the service; that he duly qualified before entering upon the service by filing the proper oath and bond required by law. No evidence adduced impeaches the inference, from these acts, that the board took the steps required of it for plaintiff's appointment as a police officer. We must hold that the evidence sufficiently shows that plaintiff was duly appointed to the office at the time he entered upon the service.

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It is claimed that plaintiff resigned, surrendered, or abandoned the office on February 1, 1905. This claim is predicated upon the fact that he acquiesced in the notice and demand of the chief of police and the commission of his removal from office, and surrendered to the city whatever articles of property he had in his possession furnished him by the city for use in the performance of his official duties. The evidence is clear that plaintiff was induced to deliver these articles in the belief that the city officers had properly discharged him from the service. Upon seeking the advice of counsel and being informed that the action taken was ineffectual, he protested against such action by instituting proceedings to set it aside and declare it for naught, and he thereby asserted his title to the office. The court properly held upon the evidence that he did not acquiesce in the removal, or surrender the office, and that he did not abandon it.

It is further contended that the court erred in finding that the duties of the office which plaintiff had held were not in fact performed and exercised by another person from the time plaintiff ceased performing them on February 1, 1905. It is averred that another person was in fact appointed to the office, and that he performed the services and received the emoluments attached to it for the period for which plaintiff now seeks to recover. Does the proof show that another person was appointed to the office held by the plaintiff, and that he performed the services and received the emoluments attached to it? The evidence material to the inquiry is that the police and fire commission and the chief of police selected several persons eligible to appointment in the police service of the city shortly after January 28, 1905, when they attempted to remove plaintiff and prevented him from performing the service, and that these persons entered upon and performed police duty under the direction of the chief of police, but that none of them were assigned to the performance of the duties which devolved on plaintiff before his at-

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tempted removal from office, and that one of the policemen in the service before January 28, 1905, was assigned to perform the duties which plaintiff had performed before February 1, 1905. It also appears that plaintiff's office had attached to it a salary of $65 per month, and that the persons appointed to the service from February 1, 1905, received a compensation at the rate of $55 per month. This evidence warrants the inference, as held by the trial court, that no specified person was performing the duties and exercising the functions of, and receiving the emoluments attaching to, the office to which plaintiff had title up to July 1, 1905. Under this state of the facts there is no basis for the claim that another person performed the duties and exercised the functions of the office to which plaintiff had title, and hence there was no officer *de facto* who can be deemed to have received the emoluments of the office.

These considerations dispose of all the questions involved on this appeal. We must hold that the court properly adjudged that plaintiff held title to the office of policeman from February 1 to July 1, 1905, and was entitled to its emoluments.

By the Court.—Judgment affirmed.

SECURITY TRUST & LIFE INSURANCE COMPANY, Respondent, vs. ELLSWORTH and wife, Appellants.

September 14—October 9, 1906.

Contracts: Several agreements construed together: Execution: Parties: Modification: Insurance agents: Advances to be repaid from commissions: Mortgages: Resignation of agent: Discharge from obligation as to advances.

1. **A note and mortgage to an insurance company, and agency contracts between the company and the mortgagor and others, all relating to the same subject matter and delivered at the same time, are construed together as one instrument.**

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2. A written contract reciting that it was an agreement between an insurance company and one E. contained a provision to the effect that said E. and certain third persons agreed that all renewal commissions accruing under certain agency contracts with E. and said third persons should be paid to the company in liquidation of a certain note. *Held*, that the signatures of said third persons were not necessary to make the contract binding, and that the provision mentioned was in effect a promise on the part of E. that the commissions should be paid as stated.
3. An agreement between an insurance company and an agent, providing that all renewal commissions accruing under certain agency contracts should be paid to the company in liquidation of a note, secured by mortgage, given by the agent for advances theretofore made to him, provided also that no call for payment of any part of the note should be made at any time in excess of the renewal commissions. Another agreement, bearing a later date, to which associate agents were also parties, provided for applying the renewal commissions to the repayment of advances thereafter to be made. Both agreements and the note and mortgage mentioned were delivered at the same time and took effect as parts of the same transaction with the consent of all parties, who obviously contemplated that the commissions would be sufficient to pay both the note and the future advances. *Held*, that the agreement of the later date did not supersede the other, and that there was no obligation to pay the note except in so far as there might be renewal commissions available for the purpose under the agreements.
4. The agency contracts in such case did not provide how long they should be in force, but recognized the right of resignation by providing that in case of resignation of the agents the company should have authority to pay subordinate agents any commissions, etc., which the agents should have agreed to pay them. *Held*, that there was no implied covenant, arising from the existence of the note and mortgage and the agreements for repayment of advances, or otherwise, which would prevent the agents from resigning if, after fair and reasonable efforts, they were unable to conduct the business successfully.
5. Having reasonably and lawfully exercised his right to resign, and having thereby ceased to be entitled to receive renewal commissions, the agent who had given the note and mortgage payable from such commissions became, by such resignation, discharged from obligation upon the mortgage indebtedness.

Appeal from a judgment of the circuit court for Kenosha county: E. B. Belden, Circuit Judge. *Reversed.*

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This action was brought for the foreclosure of a mortgage on lands in Kenosha county, Wisconsin, given by the defendants to the plaintiff company to secure the payment of $15,000 as evidenced by a promissory note dated December 22, 1903, payable one year after date with interest. On January 6, 1903, plaintiff, a life insurance company, made a contract in writing appointing the defendant *Henry Ellsworth* and his minor son Huber Hurd Ellsworth its general agent, located at Chicago, over certain designated territory, for the purpose of canvassing for applications for insurance, collecting and paying over premiums on such insurance when effected, and for the performance of such other duties as might be required of said agent, with the right to appoint subordinate agents, subject to the approval of the plaintiff, and providing that, in consideration of services rendered, the agent should be allowed, during the continuance of his agency and no longer, certain commissions upon the business done, as specified in such contract. This contract made no provision for advances to the agent, except an allowance of $150 per month for office expenses, and provided further that such allowance should not be charged against the agent, and should be continued until the renewal income of the agent should amount to $6,000 per annum. The defendant *Henry Ellsworth* entered upon the performance of said contract during the year 1903, and made contracts of insurance, received premiums, and also advanced about $15,000 for the benefit of the business, and on or about December 28, 1903, it was found there was due plaintiff from defendant *Henry Ellsworth* on account of its portion of the premiums on such insurance $15,000, to secure which sum the note and mortgage in question were given. At the time of the execution of this note and mortgage an agreement in writing bearing date December 28, 1903, was entered into, as follows:

"Articles entered into this 28th day of December, 1903, between the *Security Trust & Life Insurance Company,* a corporation of the state of Pennsylvania, of the first part, and

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Henry Ellsworth, his administrators, executors or assigns, of the city of Chicago, state of Illinois, of the second part, witnesseth:

"Whereas, the parties hereto did, on the 6th day of January, 1903, enter into a contract by the terms of which the said party of the second part and Huber Hurd Ellsworth were appointed as agents for the party of the first part in certain territory in the states of Illinois, Wisconsin, and Indiana, in said contract described, with authority to appoint subagents throughout said territory; and whereas, in carrying out the purposes and designs of said contract, it has been necessary from time to time for the party of the second part to advance to his agents considerable sums of money; and whereas, the sums of money so advanced up to the date amount to fifteen thousand dollars; and whereas, the party of the second part demands payment of said fifteen thousand dollars; and whereas, in compliance with said demand, said party of the second part has executed his promissory note for said sum, and to secure the same has caused to be executed a mortgage upon real estate situated in Kenosha county, Wisconsin, the same having been executed by *Ada F. Ellsworth* and said party of the second part.

"Now, therefore, in consideration of one dollar, each to the other in hand paid, the receipts for which are hereby respectively acknowledged, it is agreed by the parties hereto as follows:

"(1) That the said party of the first part agrees that the said note shall be considered as a call loan, but that no call for the payment of said loan or any part thereof shall be made at any time in excess of the renewal commissions accruing from time to time to the said party of the second part and Huber Hurd Ellsworth and any other parties who are or who may be associated with them or either of them in the management of said agency.

"(2) That the said party of the second part and Huber Hurd Ellsworth, S. D. Seaman, and Edward Van Asmus, their administrators or assigns, agree that all renewals that may accrue under said contract of January 6th, 1903, and a certain other contract entered into between the *Security Trust & Life Insurance Company* and *Henry Ellsworth,* Huber Hurd Ellsworth, S. D. Seaman, and Edward Van

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Asmus on the day and year first above written shall be paid to the said party of the first part in liquidation of the said note of fifteen thousand dollars referred to in this contract.

"In witness whereof the said party of the first part has caused these presents to be signed by its president and the corporate seal affixed hereto, and the party of the second part has hereunto affixed his hand the day and year first above written.

"THE SECURITY TRUST & LIFE INSURANCE CO.,
"By Geo. B. Luper, 2d Vice-President.
"HENRY ELLSWORTH."

At or about the same time a new agency agreement was made between plaintiff, party of the first part, and defendant *Henry Ellsworth,* Huber Hurd Ellsworth, S. D. Seaman, and Edward Van Asmus, parties of the second part, appointing said parties of the second part agents for the purpose of canvassing for insurance on the lives of persons, with the right to appoint subordinate agents, and providing that in consideration of the services rendered and in compensation therefor there would be allowed said agents during the continuation of their agency and no longer certain commissions. At the same time the following agreement was executed:

"Articles of agreement entered into this 29th day of December, 1903, between the *Security Trust & Life Insurance Company,* a corporation of the state of Pennsylvania, of the first part, and *Henry Ellsworth,* Huber Hurd Ellsworth, S. D. Seaman, and Edward Van Asmus, their administrators, executors or assigns, all of the city of Chicago, state of Illinois, of the second part, witnesseth:

"Whereas, the said party of the first part did enter into a certain contract with *Henry Ellsworth* and Huber Hurd Ellsworth, two of the parties of the second part hereto, on the sixth day of January, 1903, by the terms of which the said party of the first part did appoint the said *Henry Ellsworth* and the said Huber Hurd Ellsworth its general agents for the city of Chicago and vicinity; and whereas, the said *Henry Ellsworth* and Huber Hurd Ellsworth have associated with them in said general agency—or are about to do so—the said S. D. Seaman and Edward Van Asmus, two of the parties

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of the second part hereto; and whereas, the parties of the second part desire the party of the first part to make them certain advances of money during the year 1904, for the sole purpose of promoting the business of the party of the first part through said general agency:

"Therefore, in consideration of one dollar, each to the other in hand paid, the receipt of which is hereby respectively acknowledged, it is agreed by the parties hereto as follows:

"(1) That the said party of the first part shall advance to the said party of the second part certain sums of money each month during the year 1904 (unless this agreement shall cease and terminate as hereinafter provided) as follows, to wit:

On or before January 15, 1904	$1,428 00
On or before February 15, 1904	2,427 00
On or before March 15, 1904	3,107 00
On or before April 15, 1904	2,414 00
On or before May 15, 1904	1,820 00
On or before June 15, 1904	962 00
On or before July 15, 1904	1,076 00
On or before August 15, 1904	1,803 00
On or before September 15, 1904	1,715 00
On or before October 15, 1904	984 00
On or before November 15, 1904	668 00
On or before December 15, 1904	378 00

"(2) That said advances are to be made against the renewal commissions of the said parties of the second part or any of them jointly or severally.

"(3) That the said party of the first part specifically reserves the right to discontinue said advances at any time, provided the amount of paid-for life insurance business falls below the amount set forth as follows:

January, 1904	$90,000
February, 1904	111,000
March, 1904	150,000
April, 1904	160,000
May, 1904	212,000
June, 1904	289,000
July, 1904	361,000
August, 1904	437,000
September, 1904	522,000
October, 1904	608,000
November, 1904	688,000
December, 1904	765,000

"(4) That the said parties of the second part jointly and severally agree to execute an assignment of all their renewal

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interest, present and prospective, to the said party of the first part to secure the payment of said advances, together with interest at the rate of five per cent. per annum.

"(5) That the said parties of the second part jointly and severally agree to execute and deliver to the said party of the first part, not later than the fifteenth of December, 1904, a note to further secure the payment of said advances in manner and form as follows, to wit:

"For value received, we jointly and severally promise to pay to the *Security Trust & Life Insurance Company* the sum of ——— dollars in such sums as may equal any and all renewal commissions that may become due under a certain contract entered into between the *Security Trust & Life Insurance Company* and *Henry Ellsworth* under date of ———, 1903, and under another certain contract entered into on the ——— day of ———, 1903, between the *Security Trust & Life Insurance Company* and *Henry Ellsworth* and Huber Hurd Ellsworth, or under any contract that may be entered into between the said company and any or either of us, and said payments to be made from month to month as said renewals may become due under said contracts.

"Witness our hands and seals this ——— day of ———, 1904.

"(Signed) ———.

———.

"(6) That the said parties of the second part jointly and severally agree to deposit with the said party of the first part negotiable securities to be approved by the party of the first part, in such an amount as will adequately secure the payment of said advances, it being understood, however, that said parties of the second part are to assume no personal responsibility for the repayment of said advances except to apply the amounts received on renewal commissions to the repayment of the same, until fully paid.

"(7) That said party of the first part agrees that said advances shall be considered as a call loan, but that no call for the payment of said loan, or any part thereof, shall be made at any time in excess of the renewal commissions, the assignment of which is herein provided for.

"(8) That the said deposit required by the sixth paragraph hereof shall be made not later than the fifteenth day of December, 1904.

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"(9) That the said parties hereto bind themselves each to the other in the sum of twenty thousand dollars ($20,000) for the faithful performance of this agreement.

"In witness whereof, the said party of the first part has caused these presents to be signed by its second vice-president and its corporate seal to be affixed hereto, and the parties of the second part have hereunto affixed their hands and seals, the day and year first above written.

"Geo. B. Luper,
"2nd Vice-President.
"Henry Ellsworth.
"Huber Hurd Ellsworth.
"S. D. Seaman.
"Edward Van Asmus."

These instruments, including the note and mortgage, were all delivered at the same time. The parties of the second part continued in the performance of their duties under the agency until on or about the 11th day of October, 1904, at which time the defendant *Henry Ellsworth* and Huber Hurd Ellsworth tendered their resignation and withdrew from said agency, after which action was commenced to foreclose the mortgage.

The complaint is in the usual form for foreclosure of mortgage, alleging default in payment of the note. The answer admits the execution and delivery of the note and mortgage and sets up the contemporaneous agreement referred to as part and parcel of the note and mortgage, and that all renewal commissions accruing under the contracts of agency had been paid over and received by the plaintiff; that all commissions to accrue upon policies effected under the contracts had been assigned and made over to the plaintiff; that prior to the commencement of the action each of said agents resigned the agency. Except as therein admitted, the answer denied generally the allegations of the complaint. Defendants further counterclaimed and prayed judgment that the complaint be dismissed, and that the mortgage and record thereof be canceled and discharged.

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The court found in favor of the plaintiff, and judgment of foreclosure, including order for judgment against the defendant *Henry Ellsworth* for deficiency, was rendered, from which this appeal was taken.

For the appellants there were briefs by *Winkler, Flanders, Smith, Bottum & Fawsett,* counsel, and oral argument by *F. C. Winkler* and *C. F. Fawsett.*

For the respondent there was a brief by *Kearney, Thompson & Myers,* attorneys, and *Parker & Hagan,* of counsel, and oral argument by *T. M. Kearney* and *Lewis Parker.*

KERWIN, J. 1. The material facts are substantially undisputed, and the questions involved upon this appeal are mainly questions of law. The appellants contend that the note, mortgage, and other papers referred to in the statement of facts were all contemporaneous agreements between the same parties and in relation to the same subject matter, therefore should be taken together and considered as one instrument for the purpose of determining the character of the transaction and the intention of the makers; that the provision in the contract delivered with the note and mortgage, that "the said note shall be considered as a call loan, but that no call for the payment of said loan or any part thereof shall be made at any time in excess of the renewal commissions accruing from time to time to the said party of the second part and Huber Hurd Ellsworth and any other parties who are or who may be associated with them or either of them in the management of said agency," obligated the defendants to payment only in such manner, and therefore there could be no default upon the note until such renewal commissions had accrued and a call made therefor; that since no renewal commissions accrued and remained unpaid, there was no default and no right of foreclosure existed. On the other hand, it is claimed that the promise to pay, in the note and mortgage, was absolute, and that the contemporaneous writing was

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never executed by the parties to be charged, or upon whom the obligations which would give it mutuality were to rest; that by another contract between the parties the fund out of which payment was to be made had been diverted and applied to another purpose; and further, that by resigning their offices before any payment had been made on the indebtedness described in the note and mortgage the defendant *Henry Ellsworth* and his son voluntarily put it beyond their power to pay the debt in the manner contemplated in the writing, and thereby rendered themselves liable to pay it in the usual way.

The writings were all delivered at the same time; they related to the same subject matter between the same parties; and upon well-established principles so far as they can stand together they must be considered as one instrument. *Norton v. Kearney,* 10 Wis. 443; *Blakeslee v. Rossman,* 43 Wis. 116; *Severin v. Rueckerick,* 62 Wis. 1, 21 N. W. 789; *Herbst v. Lowe,* 65 Wis. 316, 26 N. W. 751; *Morgan v. Loomis,* 78 Wis. 594, 48 N. W. 109; *Hannig v. Mueller,* 82 Wis. 235, 52 N. W. 98; *Stapleton v. Brannan,* 102 Wis. 26, 78 N. W. 181; 4 Am. & Eng. Ency. of Law (2d ed.) 144.

It is insisted by counsel for respondent that the alleged contemporaneous writing dated December 28, 1903, and set out in the statement of facts was incomplete and not binding because not signed by Seaman and Van Asmus, hence effect should not be given to it. But an examination of this instrument will show that it was not intended to be signed by Seaman and Van Asmus; it was not an agreement to which they were parties or intended so to be. It recites on its face that it is an agreement "between the *Security Trust & Life Insurance Company,* a corporation of the state of Pennsylvania, of the first part, and *Henry Ellsworth,* his administrators, executors or assigns, . . . of the second part." It is in no way incomplete, nor does it appear that it was intended to be signed by any other party. The provision in the body

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of this agreement that Seaman and Van Asmus agree that all renewals accruing under the contract of January 6, 1903, and the new agency contract of December 28, 1903, shall be paid to the party of the first part in liquidation of the note and mortgage, in legal effect amounts to a promise upon the part of *Ellsworth* that all commissions accruing under these contracts shall be turned over according to the terms of the agreement. The contract is clearly and unequivocally one between plaintiff and *Henry Ellsworth*. The question respecting the language in the second clause as to other persons not parties to the contract agreeing is not one of incomplete execution, but of construction. It is quite obvious upon the face of the instrument itself that the intention of the second party was to obligate himself that the renewal commissions under these contracts should be applied at the call of the plaintiff in liquidation of the mortgage debt.

It is further claimed that the agreement dated December 29, 1903, supersedes that of the 28th. It will be borne in mind, however, that both of these writings were executed and delivered at the same time, and obviously were intended by the parties to take effect and be considered as one instrument. We are unable to see that the provisions in the writing dated December 29th are so repugnant to the instrument dated December 28th as to show that the parties intended one should supersede the other, as contended by respondent's counsel. The provisions of these contracts may in some respects be cumulative, but not repugnant. The writing of the 28th is in effect an agreement to turn over in liquidation of the mortgage indebtedness the commissions of all parties under the agency contracts of January 6 and December 28, 1903, while the contract of December 29th provides for the turning over of commissions in payment of advances to be made in 1904. Now, while both of these writings purport to transfer the commissions and were executed and delivered together, it is quite apparent that the intention of the parties was to turn

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over all commissions in liquidation of both claims, obviously contemplating that there would be sufficient to pay the mortgage debt as well as the advances of 1904. Had the business been a success, as doubtless the parties anticipated, the commissions evidently would have in a short time paid the mortgage debt as well as all advances. The writings being capable of a construction which will suffer them to stand together, such construction must be given them. *John O'Brien L. Co. v. Wilkinson,* 117 Wis. 468, 94 N. W. 337; *Knower v. Emerson,* 9 Pick. 422; *Sumner v. Williams,* 8 Mass. 162; 2 Parsons, Contracts (9th ed.) 657; *Bent v. Alexander,* 15 Mo. App. 181, 189; *Belch v. Miller,* 32 Mo. App. 387, 396; *Chicago W. & S. Co. v. Street,* 54 Ill. App. 569. Although the note and mortgage bore date December 22d there is no dispute but that they were delivered and took effect on the 29th day of December, contemporaneously with the other contracts, and the evidence is undisputed that the writings were delivered with the consent of all parties, Seaman and Van Asmus assenting to the contract of December 28th not signed by them, and which provided for the payment of the mortgage indebtedness out of commissions. It further appears that long after the execution and delivery of these writings and on or about July, 1904, a dispute arose between plaintiff and defendant *Henry Ellsworth* respecting the payment of interest upon the mortgage indebtedness, as to whether or not it should be paid out of commissions, at which time the general manager of the plaintiff, in a letter to defendant *Henry Ellsworth,* refers to the fact that the agreement makes no mention of interest, and says:

"The agreement makes no mention of interest. It was and is merely a stipulation as to our right to 'call' the principal or any part of it, leaving the interest to be paid as provided for in the notes and mortgage."

The general counsel of plaintiff also in a letter to *Henry Ellsworth* in July, 1904, speaking of his consultation with

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Mr. Luper, general manager of plaintiff, respecting the matter, refers to the first paragraph of the agreement of December 28, 1903, and says that it does not apply to interest upon the loan, but to the principal only. So it seems the officers of the company understood at this time that the agreement was in force and that the mortgage indebtedness should be paid in the manner provided in the agreement. Upon the whole record we think the agreement was that the mortgage debt should be paid out of renewals only, and that no call could be made for any portion of such indebtedness in excess of the renewal commissions as specified in the agreement.

2. It is further contended by counsel for respondent that the withdrawal from the agency of *Henry Ellsworth* and his son put it out of their power to pay the debt as provided in the contract, hence the debt became payable in the usual way. This involves the question of the right of the agent to resign, and whether or not, if such right existed, it was reasonably exercised. Both contracts of agency are silent as to the time they should remain in force, and both recognize the right of resignation by providing, "in case of the resignation or removal of the said agents, the said company may, and it is hereby authorized and empowered to, pay such subordinate agents any commissions or other remuneration which said agents shall have agreed to pay such subordinate agents and to offset against all claims under this contract such commissions or other remuneration so paid." The general rule is that, where there is no express or implied covenant to the contrary, the agent may resign at any time. Mechem, Agency, § 233. It is claimed, however, by counsel for respondent that there was an implied covenant on the part of the agents that they should not resign, and it is insisted that this covenant arises not only out of the fact of the existence of the indebtedness and the obligation to pay it, but as well out of the agreement on the part of the debtor, implied in all such cases, not to voluntarily put an end to the conditions upon

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which his agreement is of value to the creditor. This branch of counsel's contention, therefore, rests upon the assumption of implied covenant. Conceding for the sake of argument that the law would impose some obligation upon the agents not to unreasonably abandon their undertaking, still such rule must have a reasonable construction. If the law implied a covenant for the continuance of the agency, it would not extend beyond such time as was reasonably necessary to make an effort to successfully accomplish the purpose of the agency. Clearly, there was no implied covenant that the agency should be continued indefinitely when the continuance of it proved fruitless. If it were otherwise, the agents might be compelled to indefinitely continue the agency without profit to themselves or their principal. The doctrine of implied covenants is in a sense an equitable doctrine, and is enforced upon the broad principle that the law implies a covenant in the agreement where it is clear that if the attention of the party had been called to it he would have expressly agreed. So it must follow that the agents here could not have intended to agree against resignation, or that they should be compelled to continue the agency for any particular time beyond that reasonably necessary to give the business a fair trial. Implied covenants exist where equity and justice require the party to do or refrain from doing the thing in question. *Genet v. D. & H. C. Co.* 136 N. Y. 593, 32 N. E. 1078; *Scrantom v. Booth,* 29 Barb. 171, 174; *Allamon v. Albany,* 43 Barb. 33, 36; *Booth v. Cleveland R. M. Co.* 6 Hun, 591, 597; *Dermott v. State,* 99 N. Y. 101, 1 N. E. 242.

It appears quite clearly from the evidence that the defendant *Henry Ellsworth* and his associates made a reasonable effort to successfully conduct and build up the business. No claim is made that they did not diligently and faithfully perform their duties under the agency to the best of their ability. But it appears they were unable to make a success.

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This fact they communicated to the plaintiff. It is established by the evidence that the defendant *Henry Ellsworth* and his associates did not intend to be personally responsible for the advances made in building up the business of the plaintiff, but that all such advances should be paid out of the commissions accruing from the business. It will be borne in mind that the company in the new contract of agency delivered at the same time as the note and mortgage provided for large monthly advances for 1904. The agents under the contract were expected to make a reasonable effort in the performance of their duties in building up the business; beyond this they were not expected to go. It is said by counsel for respondent that at the close of the year 1903 there was $17,000 which belonged to the company as its share of first annual premiums collected by defendant *Henry Ellsworth* and his son on policies written by them. But it also appears that defendant paid $2,000 of this, and claimed that he was entitled to $15,000 on account of advances made by him in building up the business. So upon *Ellsworth's* theory at the time of the giving of the note and mortgage he was not indebted to the plaintiff in any amount, hence the recital in the contract of December 28th to the effect that it was necessary from time to time for the party of the second part to advance to his agents considerable sums of money, and that the sums of money advanced up to date amounted to $15,000, and that the mortgage indebtedness should be considered a call loan, and that no call should be made in excess of the renewal commissions accruing from time to time to the party of the second part and Huber Hurd Ellsworth and any other parties who are or who may be associated with them or either of them in the management of said agency.

The authorities cited by respondent to the point that there was a breach of implied covenant we cannot see apply to the case before us. Here there was no implied covenant to con-

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tinue, for, as said in *Genet v. D. & H. C. Co.* 136 N. Y. 593, 609, 32 N. E. 1078:

"A promise can be implied only where we may rightfully assume that it would have been made if attention had been drawn to it (*Dermott v. State,* 99 N. Y. 101, 1 N. E. 242), and that it is to be raised only to enforce a manifest equity, or to reach a result which the unequivocal acts of the parties indicate that they intended to effect. *King v. Leighton,* 100 N. Y. 386, 3 N. E. 594."

If we are correct in our conclusion that there was a right to resign and such right was lawfully exercised, then there was neither breach of covenant nor wrong in resigning, and hence the authorities cited by respondent's counsel do not apply. It seems clear that the defendant here intended and contracted to pay only out of commissions to be earned. Under the terms of the contract if none were earned he would be under no obligation to pay in any other manner. Having the right to resign and exercising that right reasonably, the contract was terminated and his obligation to pay extinguished. The fruits of his labor, whatever they might be, for the period of time he acted as agent of the company in endeavoring to build up the business, passed to the company upon his resignation, as well as the renewal commissions on policies written by him, since the contract of agency provided that renewals should run during the life of the policies, and that the agent should receive commissions during the continuance of his agency and no longer.

It is said that a debtor cannot voluntarily put an end to the conditions upon which his agreement is of value to the creditor. But this argument brings us back to the proposition of whether the defendant had a right under the contract to resign. If he had such right and exercised it lawfully, he was pursuing his rights under the contract and in accordance with it, and whether in so doing conditions valuable to the plaintiff were ended or not cannot affect the question.

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If the right existed, the consequences flowing from the exercise of it must be borne by the plaintiff. But it cannot be said upon the record that the continuance of the agency would have been of value to the plaintiff, since if the business should not prove a success while managed by defendant, and plaintiff was obliged under the contract to advance large sums of money in carrying it on, its continuance might prove a damage and not a benefit to the plaintiff.

The finding that the agents "refused and now refuse to further perform the agency contract" is wholly unsupported by the evidence. The proof is that the defendant *Henry Ellsworth* and Huber Hurd Ellsworth, long after they had notified the plaintiff that they could not make the business a success, and on the 11th day of October, 1904, tendered their resignation in writing to take effect on or before thirty days from the date thereof; that on October 14, 1904, the vice-president of the plaintiff replied by letter to said letter of resignation asking defendant *Henry Ellsworth* to receive premiums until such time as plaintiff might be able to get a new agent and get proper notice to the policy-holders. There is no evidence whatever in the record of any objection to the resignation, nor that this resignation was wrongful or against the consent of the plaintiff. So far as the record shows it may have been in the interest of plaintiff. The agent having the right to resign, and there being no evidence to the contrary, we must presume that the right was lawfully exercised.

We conclude, therefore, that the promise upon the part of the defendant *Henry Ellsworth* to pay the mortgage indebtedness was not an absolute promise, but a promise to pay in so far as there might be renewal commissions sufficient for that purpose; that there was no covenant either expressed or implied that the agent should not resign after having made reasonable effort to successfully manage the business and failed; that the right of the defendant *Henry Ellsworth* and his son to resign was reasonably and lawfully exercised, and

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that by such resignation the defendant *Henry Ellsworth* became discharged from his obligation upon the mortgage indebtedness.

By the Court.—The judgment of the court below is reversed, and the cause remanded with instructions to the court below to grant the relief prayed for in the defendant's counterclaim.

SORENSEN, by guardian *ad litem,* Respondent, vs. J. I. CASE THRESHING MACHINE COMPANY, Appellant.

September 14—October 9, 1906.

Master and servant: Personal injuries: Defective machinery: Contributory negligence: Instructions to jury: Damages.

1. Plaintiff, an employee in defendant's shop, was injured by the falling of a crane caused by the breaking of an eyebolt by which one of the iron rods supporting the crane was fastened to the framework of the building. Findings by the jury that the construction of the rod and bolt was not reasonably safe and sufficient, and that defendant's negligence in respect to such construction was the proximate cause of the injury, are *held* to be sustained by the evidence.
2. The use of the words "plaintiff's *fault*" in an instruction regarding contributory negligence and assumption of risk is *held* not to have been an error prejudicial to defendant, where, as used, they obviously meant merely a want of ordinary care on the part of plaintiff, of which the court had just spoken.
3. In an action for personal injuries an instruction that plaintiff, if entitled to recover, was entitled to such sum as would *fully compensate* him for all the elements of damage which the court had just specifically mentioned, is *held* not erroneous by reason of the use of the word "fully."

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries sustained by the plaintiff June 9, 1905, while in the employ of the defendant in its boiler shop. The machine and its

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operation and the manner in which the injury was inflicted are described by defendant's counsel substantially as follows:

There was a swinging crane used for handling large pieces of boiler plates and tires for traction engine wheels; said crane consisting of an upright post about fifteen feet high and swinging thereon near the top a horizontal arm designed to swing in a half circle, twelve or fifteen feet in length, and having on it pulleys and air hoist for the purpose of lifting material. The said upright post was held in position at the top by iron rods fastened to the top of the post and to the iron framework of the building. The punch stands about five feet high, and on the top of this is an iron post or upright of the crane about thirteen feet high. Near the top of it is a horizontal arm or boom sixteen feet in length moving in a semicircle about the upright post. On this arm is an air hoist running on a trolley, and it runs back and forth the entire length of the arm. Thus, when a tire plate is suspended from the air hoist it can be moved freely in any direction by the man on the floor. The top of the crane post is supported by four iron bars running at right angles to each other and fastened to the channel plates of the building. The one that broke was the northwest guy rod and was either seven eighths of an inch or an inch in diameter. It approached the channel plate from the post at an angle of about thirty-five degrees, and was fastened to an eyebolt an inch in diameter and about four or five inches long, which passed through the channel plate and was bolted firmly thereto at right angles with a nut on each side of the channel plate. Thus, while the strain on the guy rod was a direct pull, an angle was formed between the guy rod and the eyebolt causing the strain on the bolt to be a side or breaking strain. The bolt broke next to the channel plate on the side nearest the guy rod. The end of it and the nut which was found after the accident are in evidence, and show that, on the inner side of the break, the iron was crystallized for about twenty-five per

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cent. of the cross-section of the bolt. The only claim of negligence relied upon was in the faulty construction of the guy rod, in that a breaking strain came upon the bolt instead of a direct pull. At the time of the accident a load of about 1,000 pounds, including the air hoist and all that it carried, was resting at about the center of the arm. Much heavier loads had frequently been lifted by the same crane. The arm was pointing in a southeasterly direction, consequently bringing the strain almost entirely upon the northwest guy rod. The operator of the punch and the plaintiff, his assistant, were at work, and had just finished punching holes in one end of the tire; the plaintiff being at the south end of the tire assisting the operator to swing the tire around so as to punch the other end, when the crane toppled over, part of it striking the plaintiff upon the head, and the tire of which he had hold falling upon and crushing his hand.

Issue being joined and trial had, the jury at the close thereof returned a special verdict to the effect (1) that the construction of the rod and eyebolt in question was not reasonably safe and sufficient for the purpose of sustaining the crane in view of the character of the work required; (2) that the defendant was negligent in respect to such construction; (3) that such negligence was the proximate cause of the plaintiff's injury; (4) that the plaintiff was not guilty of any want of ordinary care which contributed to produce his injury; (5) that they assessed the plaintiff's damages at $1,500. From the judgment entered thereon in favor of the plaintiff and against the defendant for the amount stated, the defendant appeals.

For the appellant there was a brief by *Vilas, Vilas & Freeman,* and oral argument by *E. P. Vilas.*

Wallace Ingalls, for the respondent.

Cassoday, C. J. 1. Errors are assigned because the court refused to grant a nonsuit, and refused to direct a verdict in

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favor of the defendant, and refused to change the answer of the jury to the first question submitted from the negative to the affirmative, and the answers of the jury to the second and third questions from the affirmative to the negative. These alleged errors are all discussed under the general proposition that the evidence on the part of the plaintiff fails to establish any actionable negligence in the construction of the machine. A description of the machine and its operation and the manner in which the injury was inflicted are sufficiently set forth in the foregoing statement. In addition to the facts thus conceded there is evidence on the part of the plaintiff tending to prove that were several punch machines in the boiler shop; that there was a certain amount of jar or vibration caused by the operation of the machine as it was ordinarily used; that the motion of the machines jars the rods and vibrates the crane, and that the vibration of the crane and the standard vibrates the supporting rods; that a five horse-power motor was applied to punch these iron pieces, but it is geared up to such an extent that it develops a good deal more than five horse-power; that every time a hole is punched through the sheet of iron the whole machine is jarred, including the rod and crane; that there are from 150 to 200 holes in a tire sixteen feet long and twenty inches wide; that carrying a load on that crane of 1,000 pounds with the carrier about midway on the arm, pointing in a southeasterly direction, the strain, with reference to the two rear rods, would be mostly on the northwest rod, which was perfectly straight, except where the eyebolt went through the iron beam, and there there was an angle where the two pieces were tied together; that the eyebolt and the long piece formed the angle at the place where the one engaged with the other; that the machine in operation jarred or vibrated the rods, standpost and punch; that the action of the punch caused the jar; that there was heavy pounding and punching going on all the time and more or less jarring throughout the entire shop;

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that there was nothing unusual in the load being lifted at the time of the accident; that the tensile strength of iron was a pull—the tendency to lengthen; that a side or breaking strain of iron was a transverse stress or bending strain; that the cause of the breaking of the eyebolt was the fact that it was too weak to carry the load. In answer to the hypothetical question which assumed that the angle mentioned was substantially thirty-five degrees, as stated, by the defendant's counsel, an expert witness with much experience testified to the effect that where the vibration ceased at the angle in question was next to the nut, which caused the rod to crystallize; that as it crystallized it became weaker, and finally, when it became weak enough not to carry the load, it would break; that by crystallizing was meant that it would lose all the fiber of the iron and become a very different piece of material from the original; that in the absence of such fiber the surface of the iron looked more like a section of zinc; that the broken end in question was crystallized about one third across; that in the ordinary use of the crane the weakest point of the sustaining rod was just on the inner side of the nut, if both sides were screwed up solidly against the bolt on the side towards the crane, because that was the point where the leverage was placed—the leverage stopped there,—and in that four inches there was a strain on the diameter of seven eighths of an inch of about four and a half times the weight that was on the crane, tending to pull the bolt to the side and break it; that the strain on the eyebolt just next to the inner nut was a transverse or breaking strain, tending to break the bolt; that, of course, the bolt was the weakest in that direction; that such construction was not mechanical; that the construction of the rod in question and the manner in which it was tied to the beam were not the customary way but an unusual way; that the principle of the eyebolt was all wrong because it stood at a right angle to the beam; that if the truss rod had gone directly through on a line then there would have

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been tensile strength of the whole rod instead of a transverse section to bend; that the usual and customary way of fastening devices of that character, where four tension rods are in use, would be a foot formed on the end of the rod and fastened right to the girder with bolts, so as to get a direct pull, or it could pass right through the girder with angling washers on it and screwed up square to the face of the nut; that the usual and customary way was to avoid a right angle, and that is done by a foot, as mentioned, when tension rods are used; that with the foot there would not be any movement, because it runs directly on a straight line, and it all becomes tensile strength, which is very much more than a transverse stress, which is a bending strain; that it is weaker with an eyebolt in it, and grows weaker every day the rod is shaken and vibrated, because that is what produces crystallization; that crystallization is most frequently caused by sudden shocks, and so it may be caused by a continuous succession of shocks or blows, and so vibration would cause crystallization as shown by experience; that crystallization reduces the tensile strength of iron—not always so much, however, as the ductility and elongation; that assuming the angle mentioned to be about thirty-five degrees, with an eyebolt running at right angles with the beam, and then tied to a longer piece going to the stand, the weakest part of the rod in question would be at the nut.

The evidence on the part of the defendant tended to prove that the device which broke was put in about a year and a half before the accident, and that it was again inspected in the fall of 1904. We are constrained to hold that there was evidence sufficient to sustain the findings of the jury mentioned; and that such evidence was not, as a matter of law, conclusively overcome by uncontradicted evidence on the part of the defendant.

2. Exception is taken because the court, in charging the jury upon the question of contributory negligence and the as-

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sumption of risk, after defining a want of ordinary care, stated that such "want of ordinary care was not a contributing cause to produce the injury unless there was a proximate connection between such injury and such want of ordinary care; that is, it must appear from the evidence that there was such a relation between the *plaintiff's fault,* if any, and the injury that such injury was a natural and probable result thereof." The criticism is in the use of the word "fault," which is not to be commended, but, as used, it obviously referred back to "such want of ordinary care," and hence could not have misled the jury.

3. Error is assigned because the court charged the jury to the effect:

"If the plaintiff is entitled to recover at all in this action . . . he is entitled to such sum as will *fully compensate* him for such loss of earnings as you are satisfied by the evidence he has reasonably sustained as a result of the injury; for all bodily pain and suffering and mental suffering which he has endured by reason of the injury complained of; and for such permanent injuries as you are satisfied from a fair preponderance of the evidence it is reasonably certain the plaintiff will suffer in the future by reason of the injury complained of. You will answer this question regardless of your answers to the other questions, and assess such damages as you are satisfied by the evidence considered under the instructions given to you will *fully compensate* the plaintiff for *all the elements of damage* I have suggested to you."

The exception is to the words "will *fully* compensate." But, as indicated in the language quoted, those words were expressly limited to "the elements of damage" which had just been mentioned in the charge of the court. As thus limited, we do not think such charge is inconsistent with the ruling of this court in the case relied upon by counsel. *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 490, 70 N. W. 671. Nor is it inconsistent with later cases in this court on the subject. *Candrian v. Miller,* 98 Wis. 164, 167, 168, 73

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N. W. 1004; *Bergeron v. Peyton,* 106 Wis. 377, 382, 383, 82 N. W. 291. We find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

BAILEY, Appellant, vs. FINK, imp., Respondent.

September 14—October 9, 1906.

Married women: Promissory notes: Liability at law.

A married woman cannot be charged in an action at law upon a note signed by her with her husband as surety for his debt, where her act in becoming a party to the note was not necessary or convenient to the use and enjoyment of her separate property or to the carrying on of her separate business, and did not relate to her personal services. The facts that the payee changed his position (as by releasing a mortgage on the husband's chattels) on the faith of the wife's signing the note, and that the note specifically stated that she charged her separate estate with the payment thereof, are not available as grounds of liability at law.

APPEAL from a judgment of the municipal court of Racine county: WM. SMIEDING, JR., Judge. *Affirmed.*

Action to recover on a promissory note. The defendant *Anna Fink* answered, among other things, that at the time of the execution of the note she was the wife of the defendant *Charles Fink,* which was well known to the plaintiff; that she signed the note solely as surety for an antecedent debt of her husband; that the note did not concern in any way her separate estate, and that in such signing she did not intend to charge her separate estate. The cause was tried by the court and resulted in findings of fact, in substance as follows: October 17, 1902, defendant *Anna Fink* was the wife of *Charles Fink.* On such day both defendants signed the

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promissory note mentioned in the complaint, which was in the following words:

"$944.91. Mt. Pleasant, Racine Co. Wis., Oct. 17, 1902.

"Three years after date, for value received, we jointly and severally promise to pay to the order of *Ida L. Bailey* the sum of nine hundred forty-four and 91-100 dollars, together with interest thereon at the rate of seven per cent. per annum, interest payable annually, and I, *Anna Fink,* one of the makers of said note, hereby charge my separate estate with the payment of said note.

"Anna Fink.
"Charles Fink."

Defendant *Anna Fink* at that time had a separate estate. She did not receive from the plaintiff anything of value nor any consideration for her act. She signed solely as surety for her husband. Neither the note nor the consideration therefor in any way concerned her separate estate or business. Upon such findings the court concluded that plaintiff was not entitled to judgment against *Anna Fink.* The complaint was accordingly dismissed as to her, with costs.

The plaintiff excepted to the decision that *Anna Fink* did not receive any consideration for signing the note; that she signed it as surety only; and that it did not concern her separate property or business.

For the appellant there was a brief by *Gittins & Burgess,* and oral argument by *Roy Burgess.*

C. J. Richards, attorney, and *Wallace Ingalls,* of counsel, for the respondents.

Marshall, J. The only controversy here is as to whether the findings are supported by the evidence. That must be determined in the light of the familiar rule that the conclusions of a trial court on issues of fact are to be regarded as verities on appeal, unless contrary to the clear preponderance of the evidence.

There is no room for fair controversy on the evidence but

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what the note in suit was given to take up one of respondent's husband's, secured by a chattel mortgage on some live stock belonging to him, and that she signed as surety. The contention that the trial court erred in holding that she signed solely as surety, receiving no consideration therefor, and that her act did not in any way concern her separate property or estate, is grounded on evidence to the effect that *Mr. Fink* desired to rent the farm on which he and his wife resided, which belonged to the latter, to a Mr. Kosel and to have him buy the chattel property thereon, which was mortgaged to appellant; that Kosel would not deal that way unless the mortgage was released, and that the note in suit was given for that purpose.

The farm was not rented to Kosel or any one else, so far as appears, so no consideration on that score passed to respondent for her part in the transaction, unless there was one in that appellant surrendered her security on the chattels in consideration of the new note, to remove an existing impediment to renting the farm. It does not seem that the trial court was bound to so find, or to find that the transaction concerned the separate property or business of respondent, since there is ample evidence that Kosel was willing to rent the farm without buying the stock and offered to do so, but that *Mr. Fink* insisted upon his doing both if he took the place. In that situation the court was warranted in deciding that the giving of the note, as regards *Mrs. Fink,* was solely to aid *Mr. Fink* to sell his stock and that she signed as surety merely.

It is insisted that appellant changed her position on the faith of respondent's part in the transaction, and that the latter having declared in the paper that she intended to charge her separate property she should be held liable. It must be borne in mind that this is an action at law,—purely so,—although tried by the court. Respondent could not be charged in that form of action, as this court has repeatedly

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held, unless her act in becoming a party to the note was necessary or convenient to the use and enjoyment of her separate property, or to the carrying on of her separate business, or related to her personal services. Mere intention to charge her separate estate, or the existence of equitable grounds for charging it, are not sufficient at law. They are good only in equity. *Emerson-Talcott Co. v. Knapp,* 90 Wis. 34, 62 N. W. 945; *Mueller v. Wiese,* 95 Wis. 381, 70 N. W. 485; *Hollister v. Bell,* 107 Wis. 198, 83 N. W. 297; *Stack v. Padden,* 111 Wis. 42, 86 N. W. 568; *Ritter v. Bruss,* 116 Wis. 55, 92 N. W. 361; *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423; *Breed v. Breed,* 125 Wis. 100, 103 N. W. 271.

In *Hollister v. Bell, supra,* it was said:

"A married woman's note, given solely for the purpose of securing or paying the debt of a third person, is void at law and not enforcible in equity against her separate property in the absence of some equitable considerations rendering such enforcement, under the circumstances, just."

It was further said that a plain action at law upon a married woman's note cannot be turned into an equitable action and such relief given as is grantable only in equity. Again it was said in *Ritter v. Bruss, supra:*

"When it appeared by the evidence that the defendant" sought to be charged "was a married woman, and that the debt represented by the note was the husband's, there could be no recovery against her in an action at law, unless it was shown that the transaction was necessary and convenient for the use and enjoyment of her separate estate, or the carrying on of her separate business, or in relation to her personal services."

And further, quoting from *Stack v. Padden, supra:*

"It is not sufficient that a married woman shall merely make a contract *intending* to charge her separate property. It must concern her separate property or business or personal services."

So it will be seen that the conditions requisite to a recovery at law against a married woman are all clearly nega-

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tived in the findings. As we view the record such findings cannot be disturbed. The chattel mortgage released, as before indicated, was on the property of *Mr. Fink.* The debt represented by the note exchanged for the new note was solely his debt. The evidence warranted the court in concluding that the release was secured solely to facilitate his efforts to close out his stock. If there are equitable considerations for charging the property of respondent, and that she so intended, they are, as has been seen, not available in this action. The fact that the note contains a declaration of such intention is of itself a pretty strong indication that it was not thought when the paper was prepared that respondent's part in the transaction would render her liable at law.

By the Court.—The judgment is affirmed.

FRASER and others, Appellants, vs. MULANY and others, Respondents.

September 15—October 9, 1906.

Town drains: Jurisdiction of supervisors: Defective proceedings: Notice of hearing: Determination as to damages: Benefits to highway: Assessment of cost: Arbitrary or fraudulent action: Recording of orders, etc.: Remedy in equity.

1. Under the statutes relating to town drains (secs. 1359–1371, Stats. 1898) the supervisors constitute a special tribunal for administrative purposes, not proceeding according to the course of the common law, and exact compliance in all substantial matters with the statutory procedure is essential to their jurisdiction.
2. If, by noncompliance with the statute, the supervisors lose jurisdiction, their proceeding and determination are wholly void and may be attacked collaterally or directly.
3. Failure to give notice of the first hearing as required by sec. 1360, Stats. 1898, is fatal to the jurisdiction, even though there is an affidavit of the service of notice.

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4. Under secs. 1363, 1364, Stats. 1898, a determination by the supervisors of the question of damages to lands through which the ditch runs is an essential preliminary to an apportionment of the total cost of construction upon the lands to be benefited.
5. Where the ditch crosses a highway the supervisors must, under sec. 1363, Stats. 1898, before assessing the cost to the lands to be benefited, consider and determine whether such highway will be benefited and, if so, the amount of such benefit; but there is no presumption that the supervisors did not perform that duty from the mere absence of an assessment against the town on account of such a benefit.
6. Arbitrary or fraudulent omission of lands directly benefited or inclusion of lands not at all benefited renders void the assessment of the cost of constructing the ditch.
7. The recording of the order awarding damages to the owner of land, as required by sec. 1363, Stats. 1898, and of the final certificate of assessment required by sec. 1364, is essential to the validity of subsequent proceedings.
8. Where invalid proceedings to establish a drain across lands constitute a cloud upon the title or a threatened permanent injury to the land, the owner may maintain a suit in equity to have the proceedings declared void and further steps therein enjoined. The remedy by appeal from the determination of the supervisors or by *certiorari* is not adequate in such a case.

Appeal from an order of the circuit court for Walworth county: E. B. Belden, Circuit Judge. *Reversed.*

The appeal is from an order sustaining a demurrer to the complaint of the plaintiffs, praying that the defendants, who are the supervisors of East Troy, Walworth county, be temporarily and permanently restrained from all proceedings towards constructing a certain ditch, and that the proceedings already taken to authorize the same be adjudged invalid. The five plaintiffs are several owners of different parcels of land through which the ditch passes and against whom an assessment has been made for its construction and who are severally charged with the duty of maintaining specified sections thereof. The proceeding assailed is under the town drain statutes, secs. 1359–1371, Stats. 1898.

The complaint avers the filing of due petition by a sufficient number of freeholders alleging the necessary facts,

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and the making of an order of notice for hearing for the 18th day of November, 1905, but that, although such service was attempted and a so-called proof of service was made, of which a copy is attached to the complaint, such notice was not in fact served upon each of the resident owners of the several tracts of land through which the ditch would pass, either personally or by leaving a copy at their usual place of abode at least five days before the time fixed for such meeting, and that the notice was in fact not served in any manner whatsoever upon a large number of such resident owners. The so-called proof of service is made by affidavit of a nonofficial person, and states merely that he personally served the annexed notice upon the necessary persons, naming them, and that he posted such notice in three specified public places. It is further alleged that the defendants met at the time specified to examine the location and hear protests, assuming that such notices had been served, and on the 23d day of December made an order purporting to lay out said ditch and establishing the route, in form substantially according with the requirements of the statute, copy of which is annexed to the complaint, and also on said day made an order dividing said ditch into sections and assigning to each of the owners of certain parcels of land benefited, including plaintiffs', a section of such ditch to be kept in repair, and also declared an estimate of the cost of construction of each section separately, but did not determine or estimate or include in the amount necessary to be raised for the construction of said ditch any damages to any of the persons through whose lands said ditch was to pass.

The complaint also alleges that on the 26th day of December the defendants attempted to apportion and assess the total cost of construction upon the tracts of lands which in their judgment would be directly benefited, and made and signed a document purporting to be a certificate of such assessment, and filed the same in the office of the town clerk, but did not

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cause it to be recorded in the town clerk's office at any time, and the same never has been recorded; that in so apportioning said ditch it was divided into a less number of sections than the number of the several parcels of land which would be directly benefited by the construction thereof; that no agreement was ever made with any of the owners ascertaining the damages to them from the opening of the ditch, nor was any release in writing received from any such owners, and no award or determination of the damages in writing or otherwise was ever made, nor was the question passed upon or considered by the defendants; that the defendants did not apportion or assess the cost of construction upon all the tracts of land directly benefited in proportion to the benefit to be respectively derived from such tax, but arbitrarily and not in the exercise of their judgment omitted and failed to assess any portion of the cost upon a number of tracts of land which would be directly benefited, and unreasonably and arbitrarily, and not in the exercise of their judgment, did assess part of the cost of construction to several tracts of land not in fact directly or indirectly benefited by such ditch, and which, owing to their physical conformation, could not be in any manner so benefited; that the ditch is laid across at least one public highway, but defendants made no determination in any manner whether such public highway would be benefited by such construction of the ditch, nor the amount, if any, of such benefit which should be paid by the town; that certain stated amounts were assessed against the lands of each of the plaintiffs, which the defendants caused to be extended upon the tax roll of the town in process of collection at the time of making the complaint; wherefore the proceedings are declared to be unlawful and void.

The complaint further states serious damage to the several plaintiffs to result from the excavation upon their lands and the diversion of a natural watercourse or stream of great value to them and each of them for watering stock, from which

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privilege and opportunity they will be deprived, as also of other benefits derived from such watercourse in its natural state, and whereby, also, large quantities of water will be gathered together and discharged upon and over the lands of the plaintiffs, to their serious injury and the creation of nuisance thereon; that the defendants threaten and intend to let contracts and proceed with the construction of said ditch across the lands of the plaintiffs, whereby the value of their respective lands will be greatly diminished and their property injured, and that they have no adequate remedy at law.

For the appellants there was a brief by *Tullar & Lockney,* and oral argument by *Henry Lockney.*

For the respondents there was a brief by *Ryan, Merton & Newbury* and *Jay W. Page,* and oral argument by *Mr. E. Merton* and *Mr. Page.*

DODGE, J. The supervisors of a town, under the town ditch statutes, constitute a special tribunal for administrative purposes, not proceeding according to the course of the common law; hence exact compliance with the course of proceedings prescribed by law, at least in all substantial matters, is essential to their jurisdiction. Unlike courts of record, they have no jurisdiction to err as to the law governing procedure. Their field of permissive error without loss of jurisdiction is confined to those subjects over which they are authorized to exercise judgment or discretion. *Ruhland v. Hazel Green,* 55 Wis. 664, 13 N. W. 877; *State ex rel. Heller v. Lawler,* 103 Wis. 460, 79 N. W. 777; *State ex rel. Durner v. Huegin,* 110 Wis. 189, 239, 85 N. W. 1046; *State ex rel. Augusta v. Losby,* 115 Wis. 57, 63, 90 N. W. 188; *Holz v. Rediske,* 116 Wis. 353, 92 N. W. 1105. If they lose jurisdiction by failure to perform any necessary step, their proceeding and determination are wholly void and may be attacked collaterally or directly. *Ruhland v. Jones,* 55 Wis. 673, 13 N. W. 689; *McKee v. Hull,* 69 Wis. 657, 35 N. W.

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49; *Schroeder v. Klipp,* 120 Wis. 245, 97 N. W. 909. In the light of these general rules, we proceed to consider the defects in the proceeding alleged in the complaint, omitting such as appellants have not argued, on the assumption that they may have been found unsupported in fact and therefore immaterial.

1. There is positive allegation of failure to give notice of the first hearing, as required by sec. 1360, Stats. 1898. This is fatal according to unvarying authority. *Roehrborn v. Schmidt,* 16 Wis. 519; *State v. Langer,* 29 Wis. 68; *State ex rel. Foster v. Graham,* 60 Wis. 395, 399, 19 N. W. 359; *State v. Logue,* 73 Wis. 598, 41 N. W. 1061. Respondents seem to contend that assertion of the presence in the record of an affidavit of service by some one neutralizes the express allegation of absence of such service. This is mere confusion. While the complaint asserts the existence of the paper, it nowhere alleges or admits that any of the facts stated by it are true. *McVichie v. Knight,* 82 Wis. 137, 51 N. W. 1094. Another contention is that some presumption conclusively supports the proceeding, if the record shows declaration of service. It would be strange indeed if this tribunal, having no authority to proceed at all unless service was in fact made, could yet go on with condemnation of plaintiffs' lands and assessment of expenses in entire absence of such service, merely because the record showed that they believed, or said they believed, the notice had been given. No such solecism is recognized by the law. *Rape v. Heaton,* 9 Wis. 328; *Schroeder v. Klipp,* 120 Wis. 245, 250, 97 N. W. 909.

2. The next seriously debated defect in the proceedings is based upon the allegation of the complaint that the supervisors did not consider, decide, or estimate the damages to any of the persons through whose lands the ditch was to pass, nor ascertain such damages by agreement, although it is also positively alleged that serious damage would be caused to the lands of each of these plaintiffs. Sec. 1363, Stats. 1898,

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which authorizes the board to apportion the maintenance of the proposed drain in sections upon the persons directly benefited, also requires that they shall estimate the cost of constructing each such section separately, and also the damages which any owner of any parcel of land through which such drain has been laid out will sustain by reason of its construction and opening. The cost of such construction and all the damages occasioned thereby, together with the cost and expenses of surveys, maps, plans, and estimates, shall be held to be the total cost of such drain, ditch, or watercourse. By sec. 1364, Stats. 1898, it is made the duty of the supervisors to apportion such "total cost of construction" upon the several tracts of land which, in their judgment, will be directly benefited, in proportion to the benefits to be respectively derived by such tracts. Sec. 1363 further provides that, when damages are not ascertained by agreement with the owner, the supervisors "shall award to the owner of each parcel of land so damaged such amount of damages as they shall adjudge to be reasonable and just."

It is clear that the statutory scheme for constructing this ditch requires, as an essential, that before the attempt to apportion the expense of construction amongst those benefited there shall be a determination by the supervisors of the question of damages to lands through which it runs; for, obviously, the cutting of a ditch through the premises of an individual is a taking of property which is forbidden by the constitution unless due compensation be made therefor, save in the case where a nuisance exists on those very premises, which the legislature might perhaps under its police power abate at the expense of the landowner—a situation not suggested as to any of the plaintiffs in the present record. Further, it is obvious that the statute contemplates no liability of the town or any municipality for any expenses in the construction of such ditches; for the total cost, including the cost of obtaining right of way, is only authorized to be paid out of the

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assessments upon lands directly benefited in proportion to the benefits received by them. This is, of course, an exercise of the taxing power as to all lands not themselves the situs of a nuisance, and the imposition cannot be permitted to exceed the actual benefits derived. The supervisors, therefore, cannot know whether they can raise the money necessary for the construction of the ditch, including damages, until they have first ascertained the amount of such cost and whether the benefits to lands specially benefited will equal or exceed it. It is therefore not merely a matter of form, but of essential substance, that the supervisors should consider and decide upon the amount of damages caused to any property through which the ditch is to run before they can make their final order of assessment. This, according to the allegations of the complaint, they have wholly failed to do, and their further orders, to which this was a statutory preliminary, are without jurisdiction and void, as would be any attempt by them to let contracts or to enter upon the lands of the plaintiffs which it is alleged will be damaged by the proceeding. *McKee v. Hull,* 69 Wis. 657, 35 N. W. 49; *Sanderson v. Herman,* 108 Wis. 662, 84 N. W. 890, 85 N. W. 141; *Schroeder v. Klipp,* 120 Wis. 245, 97 N. W. 909; *Rude v. St. Marie,* 121 Wis. 634, 644, 99 N. W. 460; 1 Lewis, Em. Dom. (2d ed.) § 187.

3. The complaint also alleged that at least one highway was crossed by the ditch, but that the supervisors wholly failed to consider or determine whether any benefits would be derived to said highway, or how much. Sec. 1364 requires that, in case any public highway will be benefited, the supervisors shall determine the amount of such benefit which shall be paid by the town, and the remainder of such cost shall then be apportioned and assessed to the lands benefited. Clearly it is the duty, and is essential to the performance of their other functions, that the supervisors shall consider as to each highway whether it derives benefit and the amount there-

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of; for the amount to be apportioned to the other property benefited cannot be ascertained until that is done. Doubtless, however, there is no presumption from mere absence of assessment that the supervisors did not perform their duty, which it will be noticed is devolved upon them only in case a public highway is benefited. If it were alleged as a fact in the complaint that any highway was so benefited and the supervisors had failed and neglected to pass upon that question, we think it would present a fatal departure from their duty; but the complaint contains no allegation that any highway will be benefited, hence the omission to ascertain and embody in their order the amount of such benefit is immaterial.

4. It is also alleged that the supervisors arbitrarily and not in the exercise of judgment omitted lands directly benefited, and in like manner assessed portions of the cost on lands not at all benefited. While, of course, the apportionment of cost and estimate of benefits is the field over which especially discretion is given to these supervisors, subject only to an appeal to another special tribunal, and while it is probably true that the landowner must suffer the result of any honest mistake or error of judgment committed by the supervisors in this field (*Hennessy v. Douglas Co.* 99 Wis. 129, 74 N. W. 983), yet no statutory duty is more imperative than that they shall honestly exercise the judgment and discretion thus conferred on them. From the very fact of the granting of such discretion results the opportunity to abuse it. Such an opportunity can be used to wilfully and dishonestly, through favoritism or animosity, assess or exempt property, and if it is possible to prove that their final determination was the result of a failure or refusal to exercise judgment, and was reached arbitrarily or fraudulently, then such a departure from their statutory duty is disclosed as must avoid their action. *Weeks v. Milwaukee,* 10 Wis. 242, 264; *Hayes v. Douglas Co.* 92 Wis. 429, 65 N. W. 482; *Kersten v. Milwaukee,* 106 Wis.

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200, 81 N. W. 948, 1103; *Sanderson v. Herman,* 108 Wis. 662, 84 N. W. 890, 85 N. W. 141; *Friedrich v. Milwaukee,* 114 Wis. 304, 90 N. W. 174.

5. It is alleged that the supervisors have failed at any time to cause to be recorded in the town clerk's office the final certificate which they are required to make by sec. 1364, Stats. 1898, setting forth the total cost of construction, a separate description of each piece or parcel of land which in their judgment will be directly benefited, and the amount assessed by them to the same. They are also required, by sec. 1363, to cause to be recorded their order awarding damages to the owners of land. We can see no escape from the conclusion that the recording of these papers is imposed as a step essential to the validity of all subsequent proceedings. Important rights by one landowner against another and in favor of the public against the various parcels of land are to be based upon such document, and the time for enforcement of such rights may be far in the future. Similar statutes requiring filing of *lis pendens* or of orders or certificates have been held mandatory, and a breach thereof fatal to further jurisdiction. *Svennes v. West Salem,* 114 Wis. 650, 91 N. W. 121; *Ruhland v. Hazel Green,* 55 Wis. 664, 13 N. W. 877; *State ex rel. Hewitt v. Graves,* 120 Wis. 607, 98 N. W. 516; *Rude v. St. Marie,* 121 Wis. 634, 99 N. W. 460. It is of the highest importance that there should be a record to which reference can be made to ascertain the burdens resting upon these various parcels of land in order to prevent confusion and uncertainty. There were, therefore, excellent reasons why the legislature should make this duty mandatory, and why the owner of any land to be affected by such certificate should have a right to complain of its omission.

Counsel for respondents cite *Rude v. St. Marie, supra,* as adverse to that view; but a reading of that case would have shown them that the court expressly declared that, if the statute requiring town boards to file *lis pendens* in such special

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proceedings applied to supervisors, the omission would have been fatal. It was only by such construction of the statute as to exclude it from application to this tribunal that the omission was held innocuous. We must conclude that the recording of these documents is essential to the continued jurisdiction of the supervisors to proceed further in the matter.

6. It is contended that other and adequate remedy exists, so that a court of equity ought not to take jurisdiction. This contention cannot be sustained. The appeal suggested by respondents' counsel is by no means adequate. It does not run to a court. It confers review merely of the supervisors' discretionary acts, not of the validity of the proceedings. *Certiorari* is not an adequate remedy, for that is a discretionary writ which the court may refuse on the ground that the subject can be better litigated in other proceedings (*State ex rel. Hallauer v. Gosnell,* 116 Wis. 606, 93 N. W. 542), and, further, facts *dehors* the record, of which there are many alleged affecting the validity of the proceedings, as already appears, could not be availed of upon *certiorari* (*State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188). The applicability of a suit in equity to declare void the proceedings and enjoin further steps, where, as here, the proceedings constitute a cloud on the title of the property owner or a threatened permanent injury to his land, has been often declared in this state. *Ruhland v. Jones,* 55 Wis. 673, 13 N. W. 689; *Baier v. Hosmer,* 107 Wis. 380, 83 N. W. 645; *Kersten v. Milwaukee,* 106 Wis. 200, 81 N. W. 948, 1103.

By the Court.—Order appealed from is reversed, and the cause remanded for further proceedings according to law.

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BARTHOLOMAUS, by guardian *ad litem*, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

September 15—October 9, 1906.

Street railways: Injury to passenger: Collision at railroad crossing: Ordinance requiring street cars to stop, etc.: Several tracks: Negligence of employees: Evidence: Court and jury.

1. In an action against a street railway company for injuries sustained by a passenger in a collision with a train at a railroad crossing, the evidence is *held* to show, as matter of law, compliance with a municipal ordinance which made it the duty of the motorman to stop the car at least twenty feet from the railroad crossing and of the conductor to pass in front of the car a sufficient distance to enable him to ascertain whether there was any danger in sight before the car was again placed in motion.
2. Where a distance of only about eighty-five feet intervened between the tracks of different railroads crossed by street railway tracks, the ordinance did not require that a street car, which had stopped before crossing the track of the first railroad, should again stop before crossing the tracks of the second. It is sufficient in such a case if the conductor proceeds sufficiently in advance of the car to a point on the tracks of the second railroad where he can ascertain whether there is any visible danger before the car crosses them.
3. The results of calculations based upon statements of witnesses as to the speed of the railroad train, the speed of the street car, and the distances traveled by the train after the noise of its approach was heard by the conductor of the street car, do not constitute established physical facts such as would raise a conflict of evidence and make the question of negligence on the part of the conductor and motorman one for the jury, as against the uncontradicted positive testimony showing that they were not negligent in attempting to cross the tracks.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Plaintiff sues to recover damages for a personal injury. On the evening of March 16, 1902, *Henrietta Bartholomaus*,

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the plaintiff, was a passenger on one of defendant's street cars, traveling over and along Kinnickinnic avenue in the city of Milwaukee. The car reached the point where the accident occurred at about 8:40 o'clock p. m. At this point defendant's tracks extend along Kinnickinnic avenue, running in a northwesterly and southeasterly direction, and are intersected by the tracks of the Chicago & Northwestern Railway Company and the Chicago, Milwaukee & St. Paul Railway Company. The sketch on the following page represents the track of the defendant company and the railroads located at the point of intersection.

The night was cold. It had been and was still snowing, and there was a southwest wind blowing at a velocity of about twenty-five miles per hour. The street car approached the crossing from the north at about the time the regular passenger train on the Chicago, Milwaukee & St. Paul Railway, running from Chicago to Milwaukee, was scheduled to pass over the crossing on the southeasterly track of the railway. When it approached the track of the Chicago & Northwestern Railway the conductor of the car went in front of the car to where he had a clear view of this track, made observations of the track for approaching trains, and then signaled to the motorman to come along with the car, meanwhile preceding the car to the first main track of the Chicago, Milwaukee & St. Paul Railway Company. The motorman obeyed the signal and advanced the car to cross the railway tracks. Before the car had cleared the last railway track the passenger train coming from Chicago collided with the rear end of the car, threw it off the rails, caused plaintiff and other passengers to be violently thrown from their seats, and caused the injury to plaintiff's person for which she claims damages. The plaintiff charged that the defendant's servants were negligent in several respects in the performance of their duties as its servants and employees in running this car over the railway crossing. These will be specifically considered in the opin-

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ion. The case was tried before the court and a jury. The court directed a verdict to be found in defendant's favor, upon the ground that the evidence showed without dispute that defendant was not guilty of negligence as charged in the complaint, and awarded judgment against plaintiff for defendant's costs in the action. This is an appeal from such judgment.

W. B. Rubin, for the appellant.

Clarke M. Rosecrantz, for the respondent.

SIEBECKER, J. It is contended that the defendant's servants were negligent in failing to obey the ordinance of the city of Milwaukee prescribing the duties of persons operating street cars upon the streets of the city. The ordinance provides:

"It is hereby made the duty of every motorman of an electric car, . . . before crossing a railway crossing or bridge with such car, to cause the same to come to a standstill at least twenty feet from such railroad crossing or bridge, and it shall then be the duty of the conductor of such car to pass in front of the same a sufficient distance to enable him to ascertain whether there is any danger in sight and before said car is again placed in motion before crossing a railroad crossing."

One of the obvious purposes of this ordinance is to protect passengers on street cars from the dangers of collisions with railroad trains. It is charged that defendant's servants omitted their duty on the occasion of this collision, in that they failed to stop the car at the required distance from the railroad tracks of both railroads at the crossings on Kinnickinnic avenue. If the defendant's servants actually failed to comply with the ordinance as claimed, it would constitute proof tending to show the negligence charged, and under such circumstances the case should have been submitted to the jury for a determination of the question. We do not find the claim that the car was not stopped before crossing the Chicago &

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Northwestern Railway track as required by the ordinance supported by the evidence. The only witnesses testifying directly on this point are the motorman and the conductor of the car, who both state that it was stopped and that the conductor passed in front of the car and ascertained that there was no danger in sight before he signaled to the motorman to cross the track. Plaintiff relies upon the testimony of the witness Behling as contradicting this evidence, but no such contradiction appears. Mr. Behling, the gatekeeper at the railway crossing, testified that he saw the conductor in front of the car before it crossed this track and that he saw the car moving, but he nowhere asserts, nor can it be inferred from his statements, that the car did not stop as required. It is apparent that he did not observe what took place until the car was in motion in compliance with the signal of the conductor after he had ascertained that there was no danger in crossing.

It is further urged that the ordinance required that the car should be brought to a standstill at the specified distance from the Chicago, Milwaukee & St. Paul Railway tracks before crossing them, and that the conductor should perform his duties as prescribed by the ordinance before the car was again put in motion to cross them. It must be held that the ordinance was intended to prescribe a safe method of conducting the street-car business at and over railroad crossings for the best protection of passengers and the public against collision with railroad trains. An inspection of the crossing in question shows that the space necessarily occupied in running cars and trains over the respective tracks at the points of intersection was so great that this object of protection could not have been attained by stopping street cars between the two railroad companies' tracks at this crossing. The distance between the main tracks of the two railroads of about eighty-five feet is not sufficient to make it practicable to stop a car so as to avoid the dangers of collision with passing railroad trains. This

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distance is but a few feet in excess of the length of a car, and it would be impracticable to stop the car on account of the great danger of having one end of the car within the danger line of a passing train. The attempt to stop cars in such a situation would increase the danger of collision instead of diminishing it, and render the ordinance unreasonable in its operation. We must hold that defendant was not required to bring its cars to a standstill between the tracks of the two railroads before crossing the last one.

It is urged that the conductor failed to go a sufficient distance in front of the car before crossing the Chicago, Milwaukee & St. Paul Railway tracks to enable him to ascertain the danger from approaching trains. The evidence discloses that he preceded the car sufficiently in advance to a point between the rails of the first main track, or between the two main tracks. From either of these points he had a clear view of the tracks in both directions and was able to ascertain whether there was any visible danger from approaching trains in passing the crossing. He then signaled to the motorman to proceed over the crossing. This evidence shows without dispute that defendant's servants complied with the requirements of the ordinances in respect to bringing the car to a standstill at the required distance from the railway tracks and that the conductor was a sufficient distance in front of the car at the crossing and in a place to observe the danger from approaching trains.

It is further contended that there is evidence showing negligence of defendant's servants in attempting to pass over this crossing in the manner and at the time they did, because they had been informed of the approach of the passenger train before the car was in a place of danger from collision with it. This is urged on the ground that the conductor of the car was informed of the approach of the train by the noise it made as it passed upon a bridge about 300 feet to the south of the crossing, and that he was warned of its coming by the gate-

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keeper at the railway crossing when the car was remote from the danger line of the approaching train, and also that he disregarded the warning, and negligently and carelessly directed the motorman to proceed into the place of danger where the collision occurred. The witness Behling was somewhat confusing in giving his version of the transaction, but an analysis of his statements removes any apparent conflict and establishes that he spoke to the conductor concerning the coming of the train while the conductor was passing from the Chicago & Northwestern track to those of the Chicago, Milwaukee & St. Paul Railway, when he said that something was coming, though he neither saw nor heard any train. He testifies that he did not let the gates down to stop the car from passing over the track, and that he did nothing else to indicate that there was danger should the car attempt to cross. It is evident that neither he, the conductor, nor the motorman had any information at this time that the passenger train was approaching. It would seem that the conductor proceeded until he came to the main track of the Chicago, Milwaukee & St. Paul Railway, and there made his observation to ascertain whether a train was approaching from either direction; that he neither saw nor heard anything of an approaching train, and he then directed the motorman to cross the tracks, and that the motorman immediately obeyed the call and proceeded to cross in the usual way. At this time and after the car had reached the first rail of the nearest main track, Mr. Behling and the conductor heard the noise of the train crossing the bridge, and Mr. Behling then told the conductor to pull forward or to back up quickly to avoid a collision. This was manifestly what this witness intended to state as his recollection of what occurred, though it was somewhat obscured by the difficulty with which he understood English and was able to give his version of the transaction. In view of this evidence, and all the positive evidence on the subject, it is obvious that the car was partly over, or immediately adjacent

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to, the first rail of the first main track of the crossing when the noise from the train on the bridge was heard by, or made known to, defendant's servant. It is also undisputed that there was no headlight on the engine of the coming train so that it could be seen in the darkness that then prevailed. No whistle was sounded to signal its approach. When the conductor heard the train on the bridge he immediately apprised the motorman of the danger and directed him to speed the car, and this was done, but it failed to clear the crossing before the train collided with the rear end as described.

It is strenuously insisted that the evidence tending to show this state of facts is contradicted by the necessary inferences from physical facts and evidentiary circumstances. To sustain this contention appellant's counsel submits a number of calculations which are based upon statements of the witnesses as to the speed of the approaching railroad train, the speed of the car before, at the time, and after the persons in its control heard the approaching train, and the distances the train traveled after defendant's servant heard the noise of its passage over the bridge. In what respect the result of these calculations can be said to constitute established physical facts we are not informed, nor can we conceive how they can be so regarded. The calculations are based on opinions expressed on the subjects mentioned. This, however, is a very uncertain basis and can furnish no reliable results for ascertaining the exact position of the car with respect to the railroad tracks when its approach was first heard. The calculations are predicated on many facts, assumed to be fixed and certain, but which are mere opinions, and on others which may have varied much from what they were assumed to be. We do not regard these deductions as of sufficient reliability to raise a conflict with the direct evidence on the subject. They are speculative in their character and can have no probative force as against the uncontradicted positive evidence in the case.

It is also urged that the witnesses on the subject testified

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so contradictorily that the case required submission to the jury to determine the facts. The only conflicts of this nature are the statements of witnesses wherein parts of their evidence are seemingly in conflict with others, but an examination of the evidence of each witness clears up any doubt and shows harmony in all essential and material parts, and, when so treated, no such conflict is presented in the evidence on the subject of negligence from which different inferences could be drawn. We are led to the conclusion that the trial court was warranted in holding that the evidence showed that the defendant's servants were not negligent in the several respects charged in the complaint, and that the judgment dismissing the complaint was proper.

By the Court.—Judgment affirmed.

SMITH, Appellant, vs. BECKER and others, Respondents.

September 17—October 9, 1906.

Pledge of corporate stock: Sale through brokers: Evidence: Mingling of shares of pledgor with shares owned by pledgee: Assent of pledgor: Sale from common mass: Identification.

1. The question being whether there had in fact been a sale of certain shares of corporate stock which had been pledged to a bank with authority to sell, evidence showing, among other things, that the bank sent the shares to brokers with instructions to sell; that the brokers afterwards reported sales of the stock and accounted therefor to the bank at the market prices; and that the pledgor was credited with the proceeds of such sales and notified thereof, with dates and prices, to all of which he assented, is *held* sufficient to sustain a finding that there had been a valid sale under the contract of pledge, notwithstanding evidence that, in accordance with the custom of doing business on the stock exchange, the shares, after being received by the brokers, were transferred to clerks and at once indorsed by them and returned to the brokers and, even after the reported sales, remained on the books of the corporation in the names of said clerks, who in fact had no interest in

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them, and that at some subsequent time—within seven years—the shares were transferred by the brokers to the president of the bank,—there being no proof that the latter had purchased at the sales made by the brokers for the bank.

2. Assuming the existence of an agreement by a bank to keep separate the stock of each of three pledgors, each of whom was liable for the whole debt secured, the evidence is *held* to show that such pledgors subsequently assented to the mingling of the stock at the time of an exchange thereof for stock in a successor corporation.

3. The fact that a bank sold shares of stock from a certificate which included shares pledged to the bank and shares belonging to it absolutely does not show that it sold its own shares, where it appears that it had authority to sell the pledged stock without notice, that the indebtedness secured thereby was past due, and that the proceeds of the sales were credited to the pledgor, who was notified of the sales and credits and made no objection at the time.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This action was originally brought against the defendant *Washington Becker* and the Wisconsin Marine & Fire Insurance Company Bank to redeem certain securities which said bank held as collateral for the indebtedness of the plaintiff, and for discovery and accounting for the proceeds of such securities, and the setting aside of a settlement between the defendant bank and plaintiff. The action was commenced October 4, 1902, and the other defendants were afterwards brought in. The charter of the Wisconsin Marine & Fire Insurance Company Bank expired in July, 1900. The defendant *Marine National Bank* acquired, substantially, the bank assets of the Wisconsin Marine & Fire Insurance Company Bank. The defendant *Oldmar Investment Company* was organized to take a part of the assets of the Wisconsin Marine & Fire Insurance Company Bank. The defendants *Ethelinda T. Johnston* and *Harriet D. Mitchell* are the representatives of John Johnston and John L. Mitchell, deceased, stockholders in the former Wisconsin Marine & Fire Insurance Company Bank.

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The stock involved in this case is 1,542 shares of the capital stock of the Western Gas Company. In June, 1892, Frank W. Montgomery obtained from John L. Mitchell an option to purchase 3,781 shares of the capital stock of the Milwaukee Gas Light Company. Benjamin Weil and the plaintiff became interested with Montgomery in the transaction, and negotiations were made by Montgomery, Weil, and *Smith* with John Johnston and David Ferguson, then officers of the Wisconsin Marine & Fire Insurance Company Bank, by which said bank agreed to loan Weil, Montgomery, and *Smith* $378,100 on joint note, secured by Milwaukee Gas Light Company stock. The only investment made by Weil, Montgomery, and *Smith* in addition to this borrowed money was $100 paid by Montgomery to Mitchell to secure the option. At the time of this loan Montgomery, Weil, and *Smith* agreed to give Johnston and Ferguson each 500 shares of stock of the Western Gas Company, which was to be organized out of the Milwaukee Gas Light Company. This stock was known as bonus stock. At the time of the loan Montgomery acquired fifty-five additional shares of the stock of the Milwaukee Gas Light Company, which together with 3,781 shares in the name of Mitchell were returned to the company and a new certificate, No. 2,319, for 3,836 shares was issued to Frank W. Montgomery, and by him deposited with the bank as collateral security for the loan. Afterwards and in September, 1892, Montgomery assigned to Weil 1,260 shares and to plaintiff 1,260 shares by indorsement on certificate No. 2,319 for 3,836 shares, and Milwaukee Gas Light Company stock certificate No. 2,322 for 1,260 shares was issued to Weil, and by him indorsed in blank, and certificate No. 2,323 for 1,260 shares issued to plaintiff, and by him indorsed in blank, and certificate No. 2,324 for 1,261 shares issued to Montgomery, and by him indorsed in blank, and these three certificates deposited as collateral for the joint note given for $378,100.

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On December 31, 1892, the joint note for $378,100 was taken up and Montgomery, Weil, and *Smith* each made his separate note; Weil's and *Smith's* for $126,000 each, and Montgomery's for $126,100, and the note of each indorsed by the other parties. The stock of the Milwaukee Gas Light Company continued as collateral to these notes. *Smith's* note contained power of sale similar to other powers given by him subsequently. This note matured September 15, 1893. Pursuant to the original plan the Western Gas Company was organized, which purchased all the stock of the Milwaukee Gas Light Company, and issued its own stock and bonds in exchange therefor at the rate of $125 in bonds and $125 in stock of the Western Gas Company for each $100 of stock of the Milwaukee Gas Light Company. The exchange of the Weil, *Smith,* and Montgomery stock, as well as some other stock, was effected through subscription made by Montgomery. In pursuance of Montgomery's subscription and the surrender of this Milwaukee Gas Light Company stock there was issued to Montgomery certificate of the Western Gas Company No. A-010 for 6,110 shares, dated June 1, 1893, and Montgomery assigned these 6,110 shares to the various persons entitled thereto, and the Western Gas Company stock which represented the 3,781 shares of Milwaukee Gas Light Company stock given by Montgomery, Weil, and *Smith* as collateral was represented by three assignments to defendant *Washington Becker* for the respective amounts of 1,577, 1,575, and 1,628 shares. Under the reorganization Weil was to receive stock to the par value of $126,142, *Smith* $120,766, Montgomery $120,892 (the greater amount going to Weil on account of his forty-three additional shares of Milwaukee Gas Light Company stock), D. Ferguson was to have $50,000, John Johnston $50,000, and J. P. Murphy $10,200. The bonus stock, under the arrangement, was not to be delivered until the bank had been paid; therefore the entire 4,780 shares were turned over to the bank as security, and for convenience

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were placed in the name of *Washington Becker,* who was assisting the bank. On the transfer by Montgomery as collateral there were issued to *Washington Becker* three certificates of stock by the Western Gas Company, dated June 15, 1893, as follows: Certificate No. A–185 for 1,575 shares of $100 each, certificate No. A–186 for 1,628 shares, and certificate No. A–187 for 1,577 shares, which certificates represented respectively the *Smith,* Weil, and Montgomery stock, including the bonus stock and the Murphy stock. Under the arrangement thus carried out the 1,575 shares of plaintiff of the Western Gas Company stock were held in the name of defendant *Becker* with power of sale to the bank, and subject to the agreement on *Smith's* part to give his proportionate one-third of the 500 shares each to Ferguson and Johnston, and of the 100 shares to Murphy, when the bank should have been paid.

In February, 1894, Weil paid the bank his note for $126,000, and certificate No. A–186 for 1,628 shares was surrendered and a new certificate for 1,303 shares, No. A–363, issued to Weil, and a further certificate, No. A–364 for 325 shares, was issued to defendant *Washington Becker.* These 325 shares represented all but eight shares of Weil's one-third of the bonus stock, the remaining eight shares having been delivered by Weil to Vermilye & Co., New York brokers. March 3, 1893, Montgomery made a settlement with the bank and his note for $126,100 was returned. In July, 1893, the Wisconsin Marine & Fire Insurance Company Bank was placed in the hands of *Washington Becker* as receiver, and was afterwards reorganized and resumed business in 1894, with *Becker* as president and John Johnston as cashier, under name of *Marine National Bank,* defendant. In 1894 some changes were made in the form of these certificates—certificate No. A–491 for 3,477 shares was surrendered, and three certificates were issued in its place, No. A–503 for 500 shares in the name of John Johnston,

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No. A–504 for 500 shares in the name of Wisconsin Marine & Fire Insurance Company Bank, and No. A–506 for 2,477 shares also in the name of Wisconsin Marine & Fire Insurance Company Bank. In October, 1894, the bank sent the certificates indorsed in blank to Vermilye & Co., bankers and brokers in New York, to be held subject to the order of the bank. In December, 1894, the bank caused 500 shares of stock to be sold on account of Montgomery, and on these sales delivery was made from certificate No. A–503 in the name of John Johnston. On April 27, 1895, the bank made a settlement with Montgomery, and surrendered his note and some American Realty Company bonds, and a life insurance policy, and gave him a receipt in full, the bank taking from him a bill of sale of 761 shares of the Western Gas Company stock and the $82,500 bonds.

On April 27, 1895, the bank held 2,985 shares of stock, which included the plaintiff's stock held by the bank as collateral security to his note, which note authorized "said bank, or its president, or its cashier, or its assign or assigns, to sell said bonds and stock at any time hereafter at public or private sale without advertising the same or demanding payment or giving notice of such sale, and it may become the purchaser on such sale and apply the net proceeds to the payment of all or either one of the notes above described, and in such order and manner as it shall deem best." Vermilye & Co., New York bankers and brokers, to whom this stock was sent subject to the order of the bank, by instructions of said bank undertook to sell it, and reported sales at different times between the 27th day of April and the 20th day of June, 1895, aggregating 1,542 shares. On April 27, 1895, Vermilye & Co. held for the bank 2,985 shares in three certificates, one for 2,477 shares, one for 500 shares, and one for eight shares received from Weil in December, 1894.

After the reported sales by Vermilye & Co. and on or about the 24th day of June, 1895, the plaintiff made a final settle-

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ment with the bank through defendant *Washington Becker,* its representative, and at this time the whole matter was gone into respecting the reported sales. It is claimed that 700 shares of the stock held by the bank as collateral on reported sales of Vermilye & Co. were not sold, but held by Vermilye & Co. and at some time prior to May 29, 1902, transferred to defendant *Washington Becker,* who was not an innocent purchaser, and by him exchanged for American Light & Traction Co. stock, which he still holds. It is also claimed by plaintiff that 842 shares belonging to *Smith* were not sold, but were transferred by the Wisconsin Marine & Fire Insurance Company Bank to defendant *Marine National Bank* at the time of its organization, *Washington Becker* being president and John Johnston vice-president; while, on the other hand, it is contended on the part of the defendants that the bank sold the stock of the plaintiff through Vermilye & Co. under the power of sale given, and that such sale was valid. The defendants also set up as a bar to plaintiff's action the settlement made June 24, 1895; also that the statute of limitations had run against plaintiff's claim, and further that he is barred by his laches.

The court below held that the sale by the pledgee of the collateral was valid under the contract of pledge, and further found that the cause of action set up in the complaint was barred by the statute of limitations, and that the plaintiff was guilty of laches, and ordered the complaint dismissed with costs, from which judgment this appeal was taken.

For the appellant there were briefs by *Miller, Mack & Fairchild,* and oral argument by *George P. Miller.* They contended, *inter alia,* that the retention of the 700 shares by Vermilye & Co., agents for sale, under the pretense that they had made sale of the shares, did not effect any sale of the shares. *Wilson v. Carpenter,* 17 Wis. 512, 516; *Anderson v. Crisp,* 5 Wash. 178, 18 L. R. A. 419; 1 Dos Passos, Stock Brokers (2d ed.) 213, 214, 382, 383; *Rosenstock v. Tormey,*

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32 Md. 169, 183; *Maryland F. Ins. Co. v. Dalrymple,* 25 Md. 242, 267; *First Nat. Bank v. Rush,* 85 Fed. 539, 544; *Glidden v. Mechanics' Nat. Bank,* 53 Ohio St. 588; *Sharpe v. Nat. Bank,* 87 Ala. 644, 649; *Leahy v. Lobdell,* 80 Fed. 665, 670; *Bryson v. Rayner,* 25 Md. 424; *Middlesex Bank v. Minot,* 4 Met. 325; *Bank of Old Dominion v. D. & P. R. Co.* 8 Iowa, 277; *Norton v. Baxter,* 41 Minn. 146; *Appleton v. Turnbull,* 84 Me. 72; *Minneapolis Asso. v. Canfield,* 121 U. S. 295, 298; *Bryan v. Baldwin,* 52 N. Y. 232; *First Nat. Bank v. Hall,* 22 App. Div. 356; *Terry v. Birmingham Nat. Bank,* 93 Ala. 599; *Taussig v. Hart,* 49 N. Y. 301; *Pettibone v. Perkins,* 6 Wis. 616; *Kellogg v. Malick,* 125 Wis. 239, 252; Jones, Pledges, § 637; 3 Clark & M. Priv. Corp. § 622*b*, p. 1889. There is no evidence that *Washington Becker* was an innocent purchaser for value of these 700 shares. The presumption is that property dealt with in breach of a trust or other fiduciary relation is acquired by a subsequent purchaser with notice. 1 Bigelow, Fraud, 131, 135; *Sylvester v. Guernsey,* 22 Wis. 569, 572; *Weeks v. M., L. S. & W. R. Co.* 78 Wis. 501, 525. As to the 842 shares, when the bank sold them from the common mass which included shares owned by the bank itself as well as shares held by it as collateral security, it became the conclusive presumption of law that the bank had sold its own stock. The result of the bank's mixing these shares of plaintiff's with shares which afterwards became the property of the bank was that, if it wished to sell plaintiff's shares, it was obligated to identify the shares sold as plaintiff's at the moment of sale by some unequivocal act. *Nonotuck Silk Co. v. Flanders,* 87 Wis. 237, 241; *Skiff v. Stoddard,* 63 Conn. 198, 227; *Pinkett v. Wright,* 2 Hare, 120, 128 *et seq.; Newton v. Howe,* 29 Wis. 531, 535; *Haas v. Ruston,* 14 Ind. App. 8, 42 N. E. 298; 1 Dos Passos, Stock Brokers (2d ed.) 213, 214. To constitute a valid exercise of the bank's power of sale, the act must show that it was done in pursuance of the power. 2 Perry, Trusts

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(5th ed.) § 511c; *Roake v. Denn,* 4 Bligh, N. S. 1; *Blagge v. Miles,* 1 Story, 426; *Lee v. Simpson,* 134 U. S. 572, 589; *Towle v. Ewing,* 23 Wis. 336; *Lardner v. Williams,* 98 Wis. 514; *Mines v. Gambrill,* 71 Md. 30, 18 Atl. 43; *Patterson v. Wilson,* 64 Md. 193, 1 Atl. 68; *Brown v. Phillips,* 16 R. I. 612, 18 Atl. 249.

For the respondents there was a brief by *Turner, Hunter, Pease & Turner,* attorneys, and *W. H. Timlin,* of counsel, and oral argument by *Mr. Timlin* and *Mr. W. J. Turner.*

Kerwin, J. The first proposition discussed by appellant is that there was no sale of any of the stock of the plaintiff, but simply a pretense of sale. The court below found there was a sale, and the question presented under this head is whether there is sufficient evidence to support the finding. This branch of counsel's argument is classified under two heads: (1) That Vermilye & Co., who were agents for the sale of the stock, retained 700 shares thereof, representing it as sold, and at some date, not ascertained, transferred it to defendant *Becker.* (2) That as the 842 shares were a part of an indistinguishable mass of stock held by the bank, included in which were shares belonging to the bank itself, when the bank made a sale without any designation as to which stocks were sold, as a matter of law this effected a sale of the bank's own stock, and the representation made a few days later that the plaintiff's stock was sold cannot affect the situation.

1. The argument as to the 700 shares is that they were transferred to the clerks of Vermilye & Co. and immediately indorsed by such clerks and returned to Vermilye & Co., and that the clerks had no interest in them, but that they remained the property of Vermilye & Co., and stood on the books in the names of such clerks, and were afterwards transferred by Vermilye & Co. to defendant *Becker.* Vermilye & Co. had two certificates of stock from the bank for sale—one

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No. A–504 for 500 shares, and one No. A–506 for 2,477 shares. The 500 shares were on April 27, 1895, transferred to L. A. Miller, a clerk of Vermilye & Co., who indorsed and returned them to Vermilye & Co. The 2,477 shares were with the approval of the bank transferred by Vermilye & Co. into twenty-five certificates in the names of their clerks, and two of these certificates for 100 shares remained in the names of the clerks of Vermilye & Co. So, it is claimed that these 700 shares remained unsold in Vermilye & Co.'s hands. Vermilye & Co. reported, in obedience to telegrams to sell, the sale of the 700 shares remaining in the names of their clerks, and were debited for the proceeds of such sales in connection with 842 shares sold between April 27 and June 20, 1895. On the transfer of the 500 shares to L. A. Miller, certificate No. A–504 was surrendered and certificate No. A–727 for the same amount issued to L. A. Miller. The 500 shares and the 200 shares transferred to Vermilye & Co.'s clerks were accounted for at market prices on the dates sales were reported as made. No transfer on the books of the Western Gas Company of these 700 shares was made, but on report of sales from Vermilye & Co. the bank charged the amount to Vermilye & Co. and credited the amount upon the plaintiff's indebtedness, to which the 700 shares of stock were collateral. While some point is made by appellant as to the stock being sold or reported sold upon a rising market, we are unable to find from the evidence, which is voluminous, that any of the sales were made below the market price on the days sales were reported as made. But the adequacy of price is not questioned; the point is: Was there a sale of the 700 shares? The point of contention is that, because the 700 shares remained in the names of the clerks of Vermilye & Co. and such clerks appearing to have no interest in the stock, there was no sale. But upon the record we think this conclusion does not follow. It appears from the evidence that it was the custom on the stock exchange in New York to make sales in the manner

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shown by the proof in this case. It also appears that it was customary to split up certificates into small lots and indorse them in the way these were indorsed, in order to put them upon the market to advantage. The testimony is that, in dealing in stock on the New York exchange, the stock must be indorsed, before it is good delivery, by some member of the stock exchange or by some one having a membership; then it passes as a good delivery from house to house. The reasons for such indorsement are given in the evidence. After such indorsement the certificate passes current. The evidence is that buying and selling is done in the names of brokers or their clerks, although in the meantime the stock is passing from one owner to another, and finally returns to some client of the first broker, in whose name, or in the name of whose clerk, it is. The custom is for brokers to deal in their own name and not disclose their principal. This appears to be the custom in New York on the curb and in the stock exchange, and there is nothing in the evidence tending to show that the course pursued by the brokers, Vermilye & Co., raised any presumption that they did not sell the stock in the usual manner and according to the custom of brokers. 23 Am. & Eng. Ency. of Law (1st ed.) 725, 726, 775. The evidence does not show that there was any continuous ownership of these 700 shares in one person from the time of sale, April 27, 1895, until the time defendant *Becker* got the stock in 1902, but shows that the certificates were current on the market, duly indorsed, and sales of them reported to the bank by Vermilye & Co. according to the custom of doing business on the stock exchange, and the proceeds of each sale placed to the credit of the bank by Vermilye & Co. The court below found

"that for each and every one of said sales said Wisconsin Marine & Fire Insurance Company Bank received cash at the time of said sale to the amount of the proceeds of said sale, and such sale was so consummated by payment in full to the said bank, and by the broker, or broker's clerk, in whose name

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the certificate stood, delivering the same to the purchaser either by an actual manual delivery then and there, or by his becoming, by agreement and understanding with the purchaser, from thenceforth the bailee of the purchaser. And the court further finds that such mode of sale was in contemplation of the parties to said contract of pledge, who were familiar with transactions in that kind of property, and was the best and most advantageous method of disposing of this particular property."

In view of this proof of custom and the transactions between the brokers, Vermilye & Co., a reputable firm, and the bank, it cannot be said that the brokers were guilty of a breach of their engagement with the bank in violating the trust reposed in them. The court below was, at least, warranted in drawing such inference. The fact that the 700 shares remained upon the books of the Western Gas Company, while under some circumstances it might tend to prove title, is not sufficient to overcome the inferences of sale which may legitimately be drawn from the whole evidence produced. There is no proof whatever that defendant *Becker* purchased at the sale by the bank through its brokers, and the fair inference is, upon the whole record, that defendant *Becker* bought on the market at some time subsequent to the sale by the bank, and that Vermilye & Co. sold through brokers who did not in all cases disclose the name of the purchaser, and in this way the stock was permitted, as appears from the evidence to be customary, to remain in the name of parties other than the real owners. One witness testified:

"We never in any of our books, in stock transactions, have any other name entered as buyer except the name of the outside broker—the sales are made on the stock exchange. These sales in question were not listed stock, but curb stock, so called, but the same rule applies—curb brokers just the same."

Counsel for appellant makes a point on the fact that defendant brought from New York the brokers' bookkeeper and that he produced the only book he was instructed by defend-

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ant *Becker* to bring. This was a credit cash-book showing the credit items in the cash account of Vermilye & Co., *i. e.* representing the credits that Vermilye & Co. gave to the Wisconsin Marine & Fire Insurance Company Bank, which were entered as if sales of stock had been made. The evidence shows that Vermilye & Co. kept a purchase and sales book which was not produced, respecting which the witness testified:

"That book will not show the date of the transaction, the name of the person, and the amount involved. It will show simply the date, the name of the person, number of shares, and price."

There is nothing in the evidence indicating any attempt to suppress evidence on the part of any of the defendants, and nothing to show but that the plaintiff might have obtained such book or any other evidence in possession or under control of the defendants or Vermilye & Co. We cannot think there is anything in the evidence to warrant the inference that, if this book referred to had been produced, it would have shown any transaction unfavorable to defendants. Doubtless it would have shown that in some cases sales were made through brokers and the names of the purchasers not disclosed.

It is also claimed by counsel for appellant that only non-dividend-paying stock passes current without transfer on the books to the purchasers, and finally returns to the firm from whom it was originally transferred. But there is evidence that stock paying dividends passed this way, and that the dividends are paid to the person in whose name the stock is at the time of payment, although not the real owner. The transactions usually and ordinarily accompanying a sale of this character seem to have been quite fully proved. Vermilye & Co. were authorized to sell. They reported sales in compliance with such authorization and credited the bank with the proceeds, and the bank likewise debited them. The stock was parted with and passed from the possession and con-

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trol of the bank. From transactions proved both the bank and Vermilye & Co. understood there was a sale. The plaintiff was credited upon his indebtedness to the bank with the proceeds of such sales, and notified that the sales had been made, stating date, price, and credit given to him, all of which he assented to. This seems to constitute, at least in the absence of any evidence to overthrow it, quite formal proof of a sale, and is sufficient under the authorities. 1 Mechem, Sales, §§ 4, 218; *Skiff v. Stoddard,* 63 Conn. 198, 26 Atl. 874, 28 Atl. 104; 1 Cook, Corp. (4th ed.) §§ 331, 334. It is said by counsel for appellant that all these things may be sufficient to show that there might have been a sale, but they do not show a sale. We think they are sufficient to warrant the court in finding a sale upon the evidence in this case.

2. The appellant further contends that the evidence establishes an agreement between the pledgee bank and the three pledgors to keep the stock of each separate, and that this agreement applied to the stock of the Western Gas Company which belonged to plaintiff and was claimed to have been sold in May and June, 1895. The original note given by plaintiff, Weil, and Montgomery was a joint note and secured by the stock of the Milwaukee Gas Light Company. This note, however, was taken up and three notes given—one by Weil and one by *Smith* for $126,000 each, and one by Montgomery for $126,100. Each of these notes was indorsed by the other two makers, so that, while the indebtedness was separated, each continued liable for the whole debt, and the Milwaukee Gas Light Company stock was, with the approval of plaintiff, Weil, and Montgomery, sent to New York to be exchanged for Western Gas Company stock. The letter of advice by the three pledgors to the pledgee at this time directs how the stock shall be apportioned, according to which Weil was to receive stock to the par value of $126,142, *Smith* $120,766, Montgomery $120,892, Ferguson $50,000, Johnston $50,000, and Murphy $10,200. But, as has been seen, when the Western

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Gas Company issued its certificate for the Milwaukee Gas Light Company stock, it issued it to Montgomery for 6,110 shares, and this was surrendered and three certificates issued to defendant *Becker,* one for 1,628 shares, one for 1,577 shares, and one for 1,575 shares, so that no one of these certificates covered only the shares of Montgomery, Weil, or *Smith.* It seems, therefore, that the pledgors themselves assented to this mingling of shares. The evidence shows they assented to the distribution of the shares as made in the three certificates, and thereby consented that the shares need not be kept separate. Waiving the question of the competency of the proof offered by plaintiff of the oral agreement and the question whether, if any such were made, it applied to the Western Gas Company stock, we think it is established that the plaintiff assented to the mingling of shares.

But we do not regard the question of the alleged mingling of shares important. Besides the 700 shares heretofore referred to, Vermilye & Co. sold 842 shares. These were included in the two certificates sent them for sale, one for 500 shares and the other for 2,477 shares. After the certificate for the 2,477 shares was split up into twenty-five certificates, 842 shares were sold between April 27 and June 24, 1895. It is not disputed but that these 842 shares were sold, but it is insisted that, they being sold out of a certificate containing shares of the bank, it must be determined that the bank sold its own shares and not the plaintiff's. Every share of the 842 was the same as every other share in the certificate, which included the shares of the bank. There were no earmarks on any particular shares by which they could be designated as the shares of the bank or the shares of the plaintiff.

"One share of stock does not differ from another share of the same capital stock. Each is but an undivided interest in the corporate rights, privileges, and property." 2 Cook, Corp. (5th ed.) § 469; 26 Am. & Eng. Ency. of Law (2d ed.) 828; *Pietsch v. Krause,* 116 Wis. 344, 93 N. W. 9; *O. L. Packard M. Co. v. Laev,* 100 Wis. 644, 76 N. W. 596.

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So the bank could sell any 842 shares out of the 2,477 as the shares of plaintiff. But it is said that, when the bank sold from this common mass without designation as to what shares were sold, the law conclusively presumed that it sold its own shares. The evidence, however, is that at this time the bank was not selling its own stock, but the stock of plaintiff. It did designate the shares sold as the shares of plaintiff. Williams testified:

"All the sales of the Western Gas Company stock or bonds made by the bank between the dates of April 27, 1895, to June 24, 1895, inclusive, were credited to the account of and on the notes of *A. E. Smith* with the exception of thirty-four hundredths of a share."

Mr. Williams was engaged in the bank and had knowledge of the facts and was custodian of the collaterals. Upon the proof before us it cannot be said that the bank did not at the time of sale identify the 842 shares sold as the plaintiff's stock.

Respecting the contention that the stock was sold upon a rising market we may say that between April 27 and June 24, 1895, the stock materially advanced, but after careful examination of the evidence on this point we are unable to say that there was proof of any material advance in the market price of any parcel of stock sold between the date of sale and the date of the entry of such sale by the bank. But, however this may be, we do not regard the question controlling. It was doubtless better for the pledgor to have the stock sold on a rising than on a declining market. And it appears from the evidence that the stock was at least fairly well sold, and probably for prices fully up to the market at the dates of sale. Plaintiff testified that he made no objection to the way the stock was sold and had none to make. He knew all the facts respecting the sales, and settled and received the proceeds shortly after the sales had been made. When we consider that the indebtedness to which the stock was collateral was long past due at the time of sale, and that under the power of

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sale the bank had the right to sell at private sale without notice, that at least a fair market price satisfactory to plaintiff was obtained and accounted for to plaintiff, we are not impressed with the weight of this branch of appellant's argument. The case appears to have been fairly tried below, and findings made in favor of the defendants upon all the material issuable facts presented in the case. We cannot say the finding that there was a sale is not supported by the evidence. There being a valid sale under the power, no other question need be considered.

By the Court.—The judgment of the court below is affirmed.

WEGGE, Appellant, vs. MADLER and others, Respondents.

September 17—October 9, 1906.

Boundaries of land: Streets: Deed construed: "Corner" of lot: Costs of party defending separately.

1. The grantee of a lot in a recorded plat takes title to the center of an adjoining street, subject to the public easement, even where the lot is described by metes and bounds extending to the line of the street, although without express reference to such street, and also where the lot is described as bounded by the street.
2. In a conveyance of part of a lot, described by metes and bounds, the expression "the northwest corner of" the lot is *held* to mean the point at the intersection of the south and east lines respectively of the two streets at the corner of the lot and not the point at the intersection of the center lines of such streets.
3. In ejectment, where the sole heir of the common grantor of the parties was also brought in as a party and successfully defended by a separate attorney, she was entitled to recover full costs and disbursements, excluding such items as were common to both issues.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

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This is an action of ejectment. The facts are undisputed or found by the court, and are to the following effect: Ogden avenue runs east and west and is eighty feet wide. Van Buren street is eighty feet wide, and crosses that avenue at right angles. The north side of lot 1, in block 137, abuts upon the south side of Ogden avenue, and the west end of that lot also abuts upon the east side of Van Buren street. Adjoining that lot on the south side thereof is lot No. 2 in the same block, and that lot also abuts upon Van Buren street on the west end thereof. Said lots were each a little over 127 feet long east and west, and a little over sixty feet wide north and south. At the times mentioned Julius G. C. Kasten owned the portions of the two lots here in question. On March 21, 1902, the said Kasten agreed in writing with one John C. Kleist, acting for the plaintiff, to convey to him the parts of said lots described as commencing at a point fifty feet east of the northwest corner of said lot 1; thence east on the north line of said lot 1 to a point twenty-seven and one-half feet west of the northeast corner of said lot 1; thence south ninety feet; thence east to the east line of said lot 2; thence south to the southeast corner of said lot 2; thence west on the south line of said lot 2 to the east line of Ormsby's land; thence north forty-five feet; thence west six feet; and thence north to the place of beginning. The strip of land twenty-seven and one-half feet wide off the east end of said lots was during the times herein mentioned the property of one Sonlander. In pursuance of that agreement the said Kasten on April 19, 1902, conveyed the same land therein described to the plaintiff. On May 12, 1902, said Kasten conveyed to the defendant *Madler* the parts of said lots described as commencing at the northwest corner of lot No. 1; running thence south seventy-five feet along the west line of said lots 1 and 2; thence fifty feet east, parallel to the north line of said lot 2, to a point which is seventy-five feet south of the north line of lot numbered 1; thence north, parallel to

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the west line of said lots 1 and 2, seventy-five feet, to a point in the north line of lot No. 1; thence west, along the north line of said lot 1, fifty feet to the place of beginning.

This action was commenced against *Madler* alone May 22, 1902, and to the complaint therein *Madler,* by Carroll & Carroll, his attorneys therein, answered. Thereupon and on June 7, 1902, the complaint was amended by making the said Julius G. C. Kasten a party defendant. To such amended complaint therein the said Kasten by his attorney, Otto R. Hansen, made answer. August 13, 1902, the said Kasten died intestate, leaving him surviving the defendant *Alma Scheffer* as his sole heir at law. Thereupon and in January, 1903, a separate action of ejectment was commenced by this same plaintiff against the said *Alma Scheffer* and *Alfred Scheffer,* her husband, and they by their attorney, John F. Burke, made answer to the complaint therein. April 18, 1903, the two actions were duly consolidated.

Upon the trial of the two actions thus consolidated a jury was waived, and at the close of the trial the court found in effect the facts stated, and upon such facts and the admitted facts reached the conclusion in effect that the title to the premises described in the deed to *Madler* was in him and superior to any claim or title thereto in the plaintiff, and that the plaintiff was forever barred from having or claiming any title under her said deed from said Kasten to the land so owned by the said *Madler* adverse to him, and that the defendants have their costs and disbursements therein to be taxed, and ordered judgment to be entered therein accordingly. Such judgment was duly entered July 3, 1905, dismissing the complaint upon the merits, and adjudging that *Madler* was entitled to the possession of the premises described in his deed, and that *Madler* recover from the plaintiff his costs in the action taxed at $150.55, and that *Alma* and *Alfred Scheffer* have and recover from the plaintiff their costs in the action taxed at $56.22, and that executions issue

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to enforce such judgment. From such judgment and the whole thereof the plaintiff appeals.

John C. Kleist, for the appellant, contended, *inter alia,* that where the corner of a lot or block or piece of land, the occupied portion of which is bounded by two streets, or where the intersection of two streets, is named as the starting point in a description, this point will be the intersection of the center lines of such streets, unless the deed by apt, express language provides differently. *Cox v. Freedley,* 33 Pa. St. 124; *Moody v. Palmer,* 50 Cal. 31; *Low v. Tibbetts,* 72 Me. 92; *Sweatman v. Bathrick,* 17 S. Dak. 138, 95 N. W. 422; *Potter v. Boyce,* 73 App. Div. 383, 77 N. Y. Supp. 24 (in effect overruling *Holloway v. Delano,* 18 N. Y. Supp. 700); *Gas Light Co. v. R., W. & O. R. Co.* 11 N. Y. Civ. Proc. 239. See, also, *Greer v. N. Y. C. & H. R. R. Co.* 37 Hun, 346; *In re Cathedral Parkway,* 46 N. Y. Supp. 832, 834; *Perrin v. N. Y. C. R. Co.* 36 N. Y. 120; *Putzel v. Van Brunt,* 40 N. Y. Super. Ct. 501; *Stevens v. New York,* 46 N. Y. Super. Ct. 274; *Oxton v. Groves,* 68 Me. 371; *Dean v. Lowell,* 135 Mass. 55, 60; *Gould v. Eastern R. Co.* 142 Mass. 85; *Paul v. Carver,* 26 Pa. St. 223, 226; *Marsh v. Burt,* 34 Vt. 289.

For the respondent *Madler* there was a brief by *Carroll & Carroll,* and oral argument by *George J. Carroll.*

John F. Burke, for the respondents *Scheffer.*

Cassoday, C. J. 1. It will be observed that the description of the land conveyed to the plaintiff commenced at a point fifty feet east of the northwest corner of lot 1, whereas the description of the land conveyed to the defendant *Madler* commenced at the northwest corner of lot 1. Thus it appears that the northwest corner of the lot was to be the northwest corner of *Madler's* land, and that a point fifty feet east of that corner was to be the northwest corner of the plaintiff's land. The important question in the case, therefore, is as to the location of the northwest corner of that lot. The defend-

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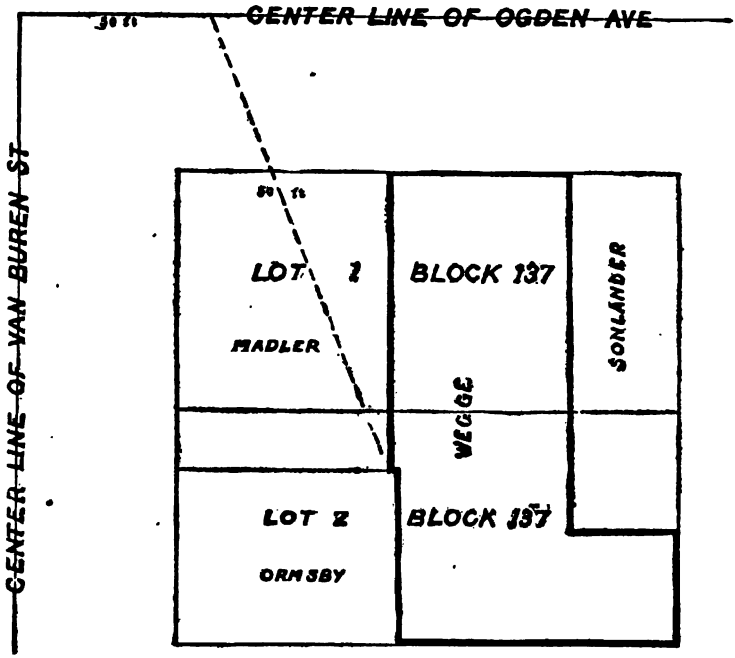
ants claim and the court held that the northwest corner of the lot was at the point of intersection of the south line of Ogden avenue and the east line of Van Buren street. The plaintiff contends that the northwest corner of that lot must be understood to mean the point of intersection of the center line of Ogden avenue and the center line of Van Buren street. In



[The heavy lines show defendants' claim as to the boundaries of the land conveyed by Kasten to the plaintiff. The dotted line indicates plaintiff's claim as to the last course in the description in his deed.]

support of such contention counsel invoke the well-established rule that the grantee of a lot in a recorded plat takes title to the center of an adjoining street, subject to the public easement. *Ford v. C. & N. W. R. Co.* 14 Wis. 609; *Pettibone v. Hamilton,* 40 Wis. 402; *Norcross v. Griffiths,* 65 Wis. 599, 606, 607, 27 N. W. 606; *Andrews v. Youmans,* 78 Wis. 56,

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47 N. W. 304; *Brown v. Baraboo,* 98 Wis. 273, 74 N. W. 223. And this is so even where the land is described by metes and bounds, extending to the line of the street or highway, although without express reference to such street or highway. Id. The same is true where the lot or land described is bounded by a public street or highway. *Gove v. White,* 20 Wis. 425; *Lins v. Seefeld,* 126 Wis. 610, 105 N. W. 917, and cases there cited. But, in view of the fact that the owner of such lot or land has no right to the possession or occupancy of any portion of such public street or highway adjoining the same, it is not customary to mention such street or highway in making a conveyance of such lot or land. It was held by this court many years ago that the land within the recorded plat of any city or village, "owned and occupied" by the debtor as a homestead, was a quarter of an acre, exclusive of the public street upon which it abutted. *Weisbrod v. Daenicke,* 36 Wis. 73. This was put on the ground that "such occupation and use" by the owner of the homestead was "inconsistent with the public easement" in such street. The correctness of such ruling is obvious. It is claimed that the contention of the plaintiff has been directly adjudicated in other jurisdictions. The cases cited and seemingly relied upon, however, merely reiterate well-established rules of law repeatedly sanctioned by this court in cases already cited and many others which might be cited. *Cox v. Freedley,* 33 Pa. St. 124; *Low v. Tibbetts,* 72 Me. 92; *Moody v. Palmer,* 50 Cal. 31; *Potter v. Boyce,* 73 App. Div. 383, 77 N. Y. Supp. 24; *Sweatman v. Bathrick,* 17 S. Dak. 138, 95 N. W. 422.

At the time of making the contract with Kleist for the benefit of the plaintiff, Kasten owned parts of lots 1 and 2, having a frontage on Ogden avenue of a few inches more than 100 feet. In making that contract and the deed given to the plaintiff in pursuance thereof Kasten manifestly intended to convey and did convey to the plaintiff enough of the eastern portion of the lots then so owned by him to give a frontage of

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fifty feet on Ogden avenue. The land so conveyed adjoined the strip of land belonging to Sonlander and mentioned in the foregoing statement. And by Kasten's subsequent deed to *Madler* he intended to convey and did convey the balance of said lots so owned by him, having a frontage on Ogden avenue of about fifty feet. The claim of the plaintiff that her west line ran in a northwesterly direction so as to give her a frontage of more than seventy-six feet on Ogden avenue, leaving less than twenty-four feet frontage on that avenue to be conveyed to *Madler,* is, in our judgment, without foundation. As held by the supreme court of Indiana, the lot must be understood to mean the land independently of the street or avenue. *Montgomery v. Hines,* 134 Ind. 221, 33 N. E. 1100. The trial court properly held that the plaintiff had no cause of action.

2. Error is assigned because the court allowed the defendants *Scheffer* to tax a full bill of costs and disbursements. No objection is made to the allowance of costs and disbursements in favor of *Madler.* He defended as purchaser from Kasten, who was brought into the case as defendant. Kasten died, and thereupon *Mrs. Scheffer,* as his sole heir at law, and her husband were brought into the case as defendants. Of course, it became necessary for them to defend or allow judgment to go against them by default. They appeared by a separate attorney; and, being successful, we perceive no reason why they were not entitled to legitimate costs. Of course, the items of costs were not to be unnecessarily duplicated. Accordingly the trial court disallowed to the *Scheffers* all items that were common to both issues. We perceive no error in such ruling.

By the Court.—The judgment of the circuit court is affirmed.

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WANDT, Respondent, vs. HEARST'S CHICAGO AMERICAN, Appellant.

September 17—October 9, 1906.

Libel: Picture of plaintiff in newspaper article as to another person.

1. **A newspaper article falsely stating that a person is a suicide fiend, has attempted suicide twenty-five times, and would usually go to the hospital and ask to be pumped out, is libelous as tending to bring that person into public contempt and ridicule.**
2. **Where a picture of plaintiff was inserted in such an article in such a way as to be in effect a statement that it was a picture of the person referred to, the article and picture together constituted an actionable libel, although the article gave as the name of the person referred to a name other than plaintiff's and although plaintiff may not have been damaged in the estimation of friends who knew her well.**

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an action for libel. The complaint charged in effect that the defendant corporation published and circulated in its newspaper, in the city of Milwaukee, the following article with the picture or photograph of the plaintiff immediately under the first headline:

"SUICIDE GIRL LAID TO REST.

"Evelyn Daly, Suicide.
[Photograph.]
"Evelyn Daly Succeeded in Taking Her Life After Twenty-five Attempts.
"(Special to the American.)

"Milwaukee, Aug. 17.—Evelyn Daly, daughter of Mrs. E. L. Daly, of East Lake, Mich., and who, under the name of Cecil Davis, of Cadillac, Mich., succeeded in ending her life after twenty-five attempts, was buried here today. Here are some of the attempts she has made within the last three months.

"June 5—Took morphine; went to Emergency Hospital and asked to be pumped out.

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"July 5—Tried to fall on dagger, but only scratched her neck.

"July 30—Jumped off open bridge, but found water too cool for comfort and yelled for help, which came in time to save her life.

"August 14—Took carbolic acid and died at Emergency Hospital.

"Miss Daly was known to the police as a suicide fiend. She would try to commit suicide at the least provocation.

"She never tried hanging. She said she didn't like the illuminating gas method, and only tried that once. But carbolic acid, morphine, and laudanum were common poisons to her. She came here about five years ago and soon manifested her suicidal mania. Usually after taking poison she would call for the police patrol to take her to the hospital, or go herself and get the poison removed.

"Sometimes she was too far gone to make her own call for help, but this was seldom,"

—and that the defendant thereby falsely, wilfully, and maliciously charged the plaintiff with having committed suicide, and with having many times attempted to commit suicide, to her great damage. A general demurrer to the complaint was overruled, and the defendant appeals.

For the appellant there were briefs by *Robert N. McMynn*, attorney, and *Darrow, Masters & Wilson*, of counsel, and oral argument by *Mr. McMynn*. They cited *Butler v. News-Leader Co.* (Va.) 51 S. E. 213; *Bianchi v. Star Co.* 95 N. Y. Supp. 28, 30–32; Townshend, Slander & L. (4th ed.) §§ 95, 96, 108, 137, 140; Newell, Defamation, S. & L. pp. 259, 260; *Hanson v. Globe N. Co.* 159 Mass. 293; *Cook v. Tribune Asso.* 5 Blatch. 352, 356; *Robertson v. Edelstein*, 104 Wis. 440, 443.

For the respondent there was a brief by *Fiebing & Killilea*, and oral argument by *O. G. Hackbarth*.

Winslow, J. It is elementary that written or printed publications which falsely tend to bring the plaintiff into

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public disgrace, contempt, or ridicule are libelous. *Bradley v. Cramer,* 59 Wis. 309, 18 N. W. 268. It is also elementary that a libel need not be in printed language, but that a caricature or picture or effigy, with or without printed language, which is understood to refer to the plaintiff, and which has the tendency to bring disgrace, contempt, or ridicule upon the plaintiff, is libelous. Newell, Slander & L. (2d ed.) ch. 4, § 1, p. 43.

A printed statement to the effect that a person is a suicide fiend, has attempted suicide twenty-five times, and would usually go to the hospital and ask to be pumped out, certainly has a tendency to bring that person into public contempt and ridicule. Had the article in question given no name, but simply stated that the person whose picture was given had done these things, there would be little doubt in the mind of any one that it would have been libelous, provided the picture was accurate enough to be recognized as the plaintiff's picture. From the allegations of the complaint it must be assumed that the picture was fairly accurate, as it is called a photograph, doubtless meaning a halftone reproduction of a photograph, which can now be made with a considerable degree of accuracy.

The insertion of the picture under the headline of the article is, of course, in effect a statement that it is a picture of the person referred to in the article. Hence the article and picture together constitute a libel as matter of law, unless the fact that the article states that the suicide's name was Evelyn Daly can be held to be an antidote to the otherwise libelous effect. This contention is strongly made by the appellant, and is in fact the only contention worthy of very serious consideration.

It seems quite true, as urged by the appellant, that persons who knew the plaintiff well, and knew her residence and family, would probably not be misled, but would at once conclude that the picture was inserted by mistake; but there may

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well be a considerable number of persons, who only know the plaintiff by sight or have merely a slight acquaintance, who would recognize the picture at once, and would conclude that the article in fact did refer to the plaintiff, concluding (if they knew the plaintiff's name at all) that such name was merely another *alias*. The complaint alleges that the plaintiff has been greatly damaged by the publication. There is ample room for the inference that she may well have been damaged in the estimation of the classes of people last mentioned. The fact that she may not have been damaged in the estimation of friends who knew her well would only affect the extent of injury and mitigate the damages. A very similar case where a like result was reached will be found in *De Sando v. New York Herald Co.* 88 App. Div. 492, 85 N. Y. Supp. 111.

By the Court.—Order affirmed.

SHUMAN, Respondent, vs. STEINEL, Appellant.

September 17—October 9, 1906.

Husband and wife: Necessaries: Contracts made by wife: Ratification: Agency: Pleading: Variance: Court and jury.

1. A set of "Stoddard's Lectures" is *held* not to have been necessaries for which, if purchased by the wife on the husband's credit, he was bound to pay.
2. When a wife contracts an indebtedness on her own credit, the mere promise of the husband to pay it stands upon the same footing as any other promise without consideration to pay the debt of another. The act of the wife in such a case is not capable of ratification.
3. But if a wife, assuming to act as her husband's agent, contracts an indebtedness and he subsequently, with knowledge of the facts, adopts her act as his own by promising to pay the debt, or by accepting the benefit of the transaction, or in any other way, he thereby becomes liable for the debt.
4. So, if a wife, assuming to act as her husband's agent, signed his

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name to an agreement to take and pay for a set of books and he afterwards adopted her act, the contract became his from the beginning; and proof of such facts did not constitute a variance from a complaint alleging that the husband contracted for the books.

5. Evidence that in such a case the husband stated that if his wife ordered the books he would pay for them at the rate of about $10 per month, and that the vendor's representative assented to such condition of payment, was sufficient to take the question of ratification to the jury.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action to recover on alleged contract liability. The complaint was to the effect that October 15, 1902, defendant contracted in writing to take of the plaintiff a set of "Stoddard's Lectures" and pay therefor $36; that plaintiff fully performed his part under such contract but that defendant refused to pay for the property.

Defendant answered denying that he agreed to purchase or that he received the property mentioned. The signature to the contract was duly put in issue so as to cast on plaintiff the burden of proof as to whether it was that of the defendant. The evidence was undisputed that the paper was made by defendant's wife, she using his or her own name. There was some testimony tending to show that she signed her own name to the paper and that it was subsequently changed by an erasure of the letter "s" from "Mrs." There was no evidence that the contract was made for the benefit of the defendant or that his wife pretended to act by his authority, or as his agent, in making it, except as indicated by evidence tending to show that she signed his name. There was an indorsement on the paper by the person who acted on behalf of plaintiff, as follows:

"Report of agent on *subscriber:*
"Name: *Mr. B. F. Steinel.*
"Age: Twenty-seven years.
"Occupation: Mil. Sptg. Review Pub. Co.

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"Married.

"Reputation for paying debts: Good.

"Other information:

"The subscriber is reliable and trustworthy, and I hereby certify that this agreement contains all the conditions made between me and the subscriber, and that his signature is genuine. J. L. Day, Jr., Solicitor."

The evidence further tended to show that defendant's wife received the books; that some time thereafter when his attention was called to the matter he said that if she ordered them he would pay for them, and that subsequently he declined to do so and offered to return the property.

After the testimony was closed defendant's counsel asked leave to introduce further evidence as to the signature having been changed, and asked to have the question submitted to the jury as to whether the credit was given to the wife and the contract signed in her name. The court ruled that the property purchased was not of the class called necessaries; that it made no difference how the contract was signed or whether there was any contract at all; that the paper did not cut any figure, except that it fixed the price of the property, and that if defendant's wife ordered the goods and received them and he subsequently promised to pay therefor he was liable. Accordingly a question covering those matters only was submitted to the jury, and was answered in the affirmative. Both sides then moved for judgment upon the verdict and the minutes of the court and the evidence. Plaintiff's motion was granted and the defendant's denied.

For the appellant there was a brief by *Edward J. Yockey,* attorney, and *James F. Trottman,* of counsel, and oral argument by *Mr. Trottman.*

For the respondent there was a brief by *Carroll & Carroll,* and oral argument by *George J. Carroll.*

Marshall, J. The assignments of error urged by appellant may be stated thus: 1. The court should have granted a nonsuit on appellant's motion because the complaint was on

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contract charging him with being the maker thereof, while the proof showed that the contract was made by his wife and that he did not subsequently ratify the same. 2. The contract was that of appellant's wife and so he was not liable without an express promise to pay, based on a new and independent consideration. 3. The contract was shown to be void because altered fraudulently in a material part. 4. The court refused to submit to the jury the question of whether appellant's wife signed the contract and the credit was given to her. 5. There was no proof that appellant promised to pay for the property. These various propositions we will not discuss in detail, but treat the case in a somewhat general way.

We can make little or no headway in determining whether the facts found by the jury are sufficient to render appellant liable by reviewing such authorities as *Day v. Burnham,* 36 Vt. 37; *Conrad v. Abbott,* 132 Mass. 330; and *Allen v. Aldrich,* 29 N. H. 63, cited to our attention by counsel for respondent. They are all cases where the wife purchased necessaries on her husband's credit. Here it was properly held that the property purchased was not necessaries, and the question of whether the purchase was made on the credit of the husband or on the credit of the wife was held by the learned court to be immaterial. The subject dealt with in *Conrad v. Abbott, supra,* is well indicated in the following language of the syllabus:

"A promise by a husband to pay for necessaries which have been furnished to his wife upon his credit, if they are such as he is bound to supply her with, . . . amounts to a ratification of her contract, upon which an action may be maintained, even if she had no previous authority to purchase them."

The decision went upon the ground, which all such do, that the wife in making the purchase was presumed to assume authority to act for her husband. The court said:

"The act of one assuming to be an agent, but done without authority, may be ratified, and in such case the liability of the principal arises upon the ratification."

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Cases cited by respondent to support the contention that the mere promise of the husband to pay for goods, not necessaries, purchased by the wife on her own credit makes him liable do not so hold. They all proceed upon the theory of ratification of the act of the wife assuming to act for her husband. Of course, in case of necessaries the element of assumed agency is much more readily proved than in case of other property. When a wife contracts an indebtedness on her own credit, then the mere promise of the husband to pay it is of no greater dignity than any promise without consideration to answer for the debt of another. That is elementary. It must be assumed that the trial court so understood the law and held appellant liable under the doctrine of ratification, upon the theory that it applied to the circumstances of the case though they only included the elements of ordering the goods by the wife, receiving the same by her, and promise by appellant to pay therefor; that the elements of whether she assumed to act as agent in the matter or ordered the goods on her own credit were immaterial.

As to the importance of the omitted elements, in Mechem on Agency at § 127, the rule is stated thus:

"The act ratified must also have been done by the assumed agent as agent and in behalf of the principal. If the act was done by him as principal and on his own account, it cannot thus be ratified."

The judicial authorities are in harmony therewith. In *Meiners v. Munson,* 53 Ind. 138, cited by appellant, we have a good example. There the court said:

"The rule of law is, that a ratification can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person."

And further, citing from Chitty on Contracts (11th Am. ed.) 293:

"But where the party making the contract had no authority to contract for the third person, and did not *profess,* at

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the time, to act for him, it seems that the subsequent assent of such third party, to be bound as principal, has no operation."

And further, citing from 1 Parsons on Contracts (6th ed.) 346, where the author was speaking of a situation similar to that before us,

"We may add that such a case would perhaps fall within the rule, that no act is capable of ratification by the principal which was not performed by the agent *as agent,* and in behalf of the principal."

To the same effect are *Saltmarsh v. Candia,* 51 N. H. 71, 76; *Wilson v. Hayes,* 40 Minn. 531, 42 N. W. 467; *Mitchell v. Minnesota F. Asso.* 48 Minn. 278, 51 N. W. 608; *Schreyer v. Turner F. Co.* 29 Oreg. 1, 43 Pac. 719; *Minnich v. Darling,* 8 Ind. App. 539, 36 N. E. 173.

The argument advanced that appellant could not become liable in the absence of an express promise, based on a new and independent consideration, in any event, is answered by the rule that the liability of one who ratifies as principal the unauthorized act of another, who assumed to contract in his behalf, goes upon the ground of adoption of the unauthorized act, and therefore requires no consideration. So, if appellant's wife, assuming to act as his agent, ordered the books from respondent and received them, and he subsequently, with knowledge of the facts, adopted her act as his own by promising to pay for the property, or by accepting the benefit of the transaction, or in any other way, he thereby became liable for the indebtedness.

From the foregoing it seems plain that the question of whether appellant's wife signed his name to the contract, and the one as to whether she assumed to act for him, were material on the question of his liability. There was some evidence that she signed her own name to the paper, and we must assume that other evidence on that line, which appellant asked leave to present after both sides had rested, would have been offered and received had the court not held that, if she

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signed her own name and the credit was given to her, the promise by her husband to pay the debt made it his obligation; since the rejection of the offer of additional evidence was placed on the ground of immateriality.

What has been said seems to govern all the questions raised which need attention. The motion for a nonsuit upon the ground that the signature of the appellant was put in issue and no proof was produced to show that he did sign the paper, but on the contrary the evidence was to the effect that his wife signed her own name thereto and that subsequently the signature was fraudulently changed, was properly overruled because, as to whether the signature was changed, the evidence was in conflict, and as to whether the signature should be regarded as appellant's turned on the question of ratification. If the wife signed appellant's name, assuming to act as his agent, and he afterwards adopted her act, the contract became, in legal effect, his from the beginning and was enforceable as such. It follows that the claim that a recovery based on ratification was a departure from the one set forth in the complaint cannot be approved.

The claim that, assuming for the purposes of the case the circumstances were such that a promise on the part of appellant to pay for the books would have ratified the act of the wife as his, there was no proof of such a promise, the court properly ruled in respondent's favor. The testimony was to the effect that appellant's statement, that if his wife ordered the goods he would pay for them at the rate of about $10 a month, was assented to, as the jury were warranted in concluding. The person who represented plaintiff testified that he said to appellant he thought the condition of payment suggested would do, and in subsequent communications in respect to the matter there was no change as to such assent.

So the case comes down to this: The trial court erred in not submitting to the jury in some proper way whether appellant's wife assumed to act as agent for her husband or

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signed her own name and the credit was given to her. If she signed her name to the paper and did not assume to act as agent for her husband, as before indicated, there could be no ratification, and, under the circumstances of the case, no liability on the part of appellant created by his mere promise to pay for the goods.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

GYMNASTIC ASSOCIATION OF THE SOUTH SIDE OF MILWAUKEE, Appellant, vs. CITY OF MILWAUKEE and another, Respondents.

September 17—October 9, 1906.

Statutes: Construction: Repeal: Taxation: Exemptions: Turner societies: "Property used exclusively for educational purposes:" Indivisible building partly rented for other purposes.

1. A statute directed towards a special subject is ordinarily preponderant over a later and more general statute; but when the earlier statute is special only in the sense that it applies to a single case, of which there are many in the state, and the later statute is general in its operation and applies to all such cases, then the earlier one is deemed to be superseded by the later and, so far as inconsistent, to be repealed.
2. Thus ch. 44, P. & L. Laws of 1869, incorporating the plaintiff Turner society and exempting all its property from taxation, was superseded and repealed, as to such exemption, by ch. 309, Laws of 1883 (subd. 23, sec. 1038, Stats. 1898), providing that all the "property of the Turner societies which are or may be incorporated under the laws of this state, which is used exclusively for educational purposes, is hereby exempted from taxation."
3. Under a statute limiting exemptions to property "used exclusively for" a specified purpose, a devotion of the income of the property to such purpose is not sufficient, but there must be primary physical use therefor of the very property for which exemption is claimed.
4. Thus, where portions of a building owned by a Turner society were leased for a saloon and a barbershop, the building was not

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"used exclusively for educational purposes," within the meaning of subd. 23, sec. 1038, Stats. 1898, even though the rentals received were used by the society for such purposes.

5. Under said statute the whole of an indivisible building, and the ground on which it stands, is subject to taxation unless the whole is rendered exempt by being used exclusively for educational purposes.

[6. Whether a mere incidental use promotive of the main purpose (as the letting of a hall for lectures when not required for the uses of the society owning it, or the use of parts of a building for living rooms for teachers or janitors) would destroy the exemption, not determined.]

Appeal from an order of the circuit court for Milwaukee county: Warren D. Tarrant, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to the plaintiff's complaint praying cancellation of an assessment and levy of general taxes for the year 1904 on plaintiff's real estate, and for temporary and permanent injunction against any steps to collect such taxes. The complaint alleges that plaintiff is a corporation organized under ch. 44, P. & L. Laws of 1869, under the name of *"The Gymnastic Association of the South Side of Milwaukee,"* called in German "Der Turn Verein der Suedseite von Milwaukee," without stock and not for profit, and that it is authorized to own and hold real estate for the purposes of the association not exceeding in value $50,000. Such act also provided "that all real and personal property of this association shall be exempt from taxation." It is alleged that the property in question held by the association is of the value of about $25,000, with a mortgage thereon of $10,000; that the same is divided into a gymnasium, a dining room on the first floor, and a saloon and barbershop in the basement; that the saloon is rented to the janitor of said building for $45 per month, together with the use of a room in the rear for living purposes, in consideration of which contract of rental the janitor is required to perform all the duties of janitor for the entire building, the saloon being run by him for his own profit. The barbershop

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is rented to persons not members of the association at a rental of $12.50 per month. Both saloon and barbershop front on the street and are open to the general public. It is further alleged that the gymnasium hall is frequently rented to outside parties for dances, political meetings, concerts, and lectures at prices ranging from $15 to $40; that all of said rentals, together with the annual dues of $4.20 of each of the 500 members, go into the treasury of the association and are expended in paying its necessary expenses; that the plaintiff conducts regular gymnastic exercises in the gymnasium each day except Sunday for eleven months in the year and regularly employs a gymnastic instructor at a salary of $1,200 per annum; that from 300 to 320 children between the age of six to fourteen years, as well as adults, receive instruction covering the whole field of gymnastics; that for such instruction the members of the association and their children pay nothing, while others pay twenty-five cents per month; that the plaintiff also conducts during the winter months a course of lectures on scientific and historical subjects, also a series of debates. Under the organization of the plaintiff corporation no dividends or pecuniary profits can be made by individual members thereof; no salaries are paid to officers, except $1,200 a year to the physical instructor and $75 to the finance secretary. The complaint also alleges the levy and attempted collection by the city of taxes and the cloud upon title resulting therefrom.

Julius E. Roehr, for the appellant.

For the respondents there was a brief by *John T. Kelly,* city attorney, and *Benjamin Poss,* assistant city attorney, and oral argument by *Mr. Poss.*

Dodge, J. 1. The first question to be resolved is whether the taxability of plaintiff's property is governed by the special act incorporating it, ch. 44, P. & L. Laws of 1869, or by the general statute, originally ch. 309, Laws of 1883, which,

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before the assessment of these taxes, had become embodied in the revision of 1898 as subd. 23, sec. 1038, Stats. 1898, and provides:

"All of the real and personal property of the Turner societies which are or may be incorporated under the laws of this state, which is used exclusively for educational purposes, is hereby exempted from taxation."

There is, of course, a well-recognized rule of statutory construction to the effect that an act directed towards a special subject is ordinarily preponderant over a more general act, yet that is, at best, but a rule of construction, yielding whenever a contrary legislative intent is reasonably apparent; and such intent will ordinarily be inferred, first, where the later and more general act governs the whole subject to which it relates, and is manifestly designed to embrace the entire law thereon; and, more specific still, when the earlier statute is special only in the sense that it applies to a single case, of which there are many in the state, and the later statute is general in its operation and applies to all such cases, then the earlier one is deemed to be superseded by the latter and, so far as inconsistent, to be repealed. *Southport v. Ogden,* 23 Conn. 128; *Coe v. Meriden,* 45 Conn. 155; *Hartford v. Hartford T. Sem.* 66 Conn. 475, 34 Atl. 483; *Louisville & N. R. Co. v. Williams,* 103 Ky. 375, 45 S. W. 229; *Nusser v. Comm.* 25 Pa. St. 126; *Rhoads v. Hoernerstown Bldg. & Sav. Asso.* 82 Pa. St. 180, 187; *Best v. Baumgardner,* 122 Pa. St. 17, 15 Atl. 691; *Westfield v. Tioga Co.* 150 Pa. St. 152, 160, 24 Atl. 700; *Kellogg v. Oshkosh,* 14 Wis. 623, 628; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 52, 98 N. W. 954.

In the legislation under consideration we find all the elements to make the last-stated rule applicable. There were in the state many Turner societies organized under special acts, most of them doubtless accorded exemption from taxation like the plaintiff, others, perhaps, without such exemp-

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tion or with it under different limitations. Then we have the many Turner societies organized for similar purposes under general statutes and having no such individual exemption, unless, perhaps, under the general exemption to charitable and educational associations, the applicability of which might be considered doubtful. There was every reason why the legislature should treat all such societies alike, and none for any difference. There is, therefore, the highest probability that when a general law was passed in terms applicable to all Turner societies, as was done in 1883, it was intended to express the legislative purpose as to the exemption from taxation which any such society should enjoy. We deem it clear that under the act of 1883, and even more obviously in the general revision of the statutes in 1898, it was intended to revise and legislate upon the whole subject of the exemption which Turner societies should enjoy, and that such legislation supersedes completely and thereby in effect repeals the exemption contained in such an individual private act as that creating the plaintiff. That view has been already taken for granted, without discussion, in *Green Bay & M. C. Co. v. Outagamie Co.* 76 Wis. 587, 45 N. W. 536, where it was assumed that the exemption of property of a Turner society was controlled by ch. 309, Laws of 1883, although that society was incorporated under a private act conferring the same right of exemption from taxation as that incorporating the plaintiff.

2. The next subject of inquiry is whether the building of the plaintiff is shown to have been used exclusively for educational purposes within the terms of subd. 23, sec. 1038, Stats. 1898. Such property is a single indivisible building of which certain portions of the street frontage are leased for commercial purposes in no wise connected with education except that the rents for such occupancy go into the general treasury of the society and are devoted to the payment generally of its expenses, including, of course, the interest upon

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its indebtedness, and, perhaps, so far as there is any surplus, to reduction of the principal, which was doubtless incurred for the purpose of providing the building in which the society's educational functions are accomplished, as also any social or other purposes which it may have. On the part of the respondent it is contended that the words "exclusively used for educational purposes" can only be satisfied by the direct physical use of the property itself in the work of education, while on the part of the appellant it is contended that they may be satisfied by the use of profits or earnings of such property in support of education. Thus the somewhat narrow and concrete question is presented. Doubtless the natural and exact meaning of the words would be in accord with the respondent's contention. A building which is used for a saloon is not in the exact sense of the words used for educational purposes, and can be brought within such words only by according them something broader and more liberal than their literal expression.

Of course, we start with the general proposition that such statutes according exemption from taxation are to be strictly construed, and understood to confer exemption only so far as their words, by their natural and necessary meaning, go. *Katzer v. Milwaukee,* 104 Wis. 16, 80 N. W. 41. This rule alone would seem sufficient to preclude appellant's contention, but there are other considerations which tend to confirm the more limited scope of the exemption. In ascertaining the meaning of words there is a natural presumption that they are used by the legislature in the same sense as the same words elsewhere in the same statute. We find in sec. 1038, Stats. 1898, exemption of property of various classes of owners when the same is exclusively devoted to or used for certain defined purposes. Thus, in subd. 4, lands owned and used by the state or any county agricultural society exclusively for fair grounds; in subd. 5, buildings and ground owned by organized fire companies and used exclusively for

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their proper purposes; in subd. 17, property of fair associations while used exclusively for fairs and exhibitions; in subd. 20, property of private corporations for care of the insane used exclusively for such purposes; and in subd. 22, the property of any corporation used exclusively for the purpose of manufacturing zinc oxide. Now, in many of these instances it would obviously be inconceivable that the legislature intended to exempt property the profits or earnings of which were devoted to the purposes named. In case, for example, of the private insane asylums, which are corporations which may be organized with capital stock and for pecuniary profit, it would be absurd to exempt property not itself used for that purpose, such as stores or rented farms, merely because the income thereof is devoted to the maintenance of the insane asylum. That would only result indirectly in applying such proceeds to the personal profit of the stockholders, either presently or prospectively. But if the words "exclusively used" are in such subdivision clearly intended to be limited to the physical use of the property itself, why must we not presume that the like words were used with the same meaning in subd. 23, relating to Turner societies? If appellant's construction of such words be adopted, the kinds of property and, in many cases, the amount which may be exempted is without limit. Commercial blocks, office buildings, vessels, and farms, as also bonds and mortgages, not distinguishable in their physical use or employment from other like property, may be held exempt from the usual burdens of taxation provided only that their net profits or earnings be devoted to the favored purposes, some of which, as already shown, are ultimately purely mercenary. Such result would, we think, greatly surprise the framers of these various exemption provisions in our statutes. From such considerations we are convinced that all reason is against appellant's construction.

The only authority cited conflicting with this view is *North*

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St. L. G. Soc. v. Hudson, 12 Mo. App. 342, affirmed in 85 Mo. 32, which is identical with the present case in all material particulars. That case seems to stand entirely alone. It was decided by two of three commissioners without participation by any of the justices of the supreme court. No authority is cited to support the conclusion. It seems to us to be in direct conflict with the holding of the supreme court of that state in *Wyman v. St. Louis,* 17 Mo. 335, where it was decided that a building, of which the upper stories were occupied as a school and the lower story was rented for commercial purposes, was not exempt under a statute requiring that the building should be used for school purposes. The *Gymnastic Society Case* has apparently never been cited or approved in Missouri, but is in principle repudiated in *Fitterer v. Crawford,* 157 Mo. 51, 57 S. W. 532, where exemption was denied to a Masonic hall of which the ground floor was rented and the proceeds applied to the purposes of the society, on the ground that the building was not used exclusively for charitable purposes, although the purposes of the Masonic society were held to be charitable. We think this last case overrules the earlier one, and deprives it of authority even in Missouri.

Elsewhere throughout the country an array of authorities far too numerous for complete citation sustain the view that under a statute limiting exemptions to property "used for," "devoted to," or "used exclusively for" a specified purpose, a devotion of the income of such property to such favored purpose is not sufficient, but that the statutes require the primary physical use therefor of the very property for which exemption is claimed. The following may be mentioned: *Indianapolis v. Grand Lodge,* 25 Ind. 518; *Hibernian Ben. Soc. v. Kelly,* 28 Oreg. 173, 42 Pac. 3; *St. Mary's College v. Crowl,* 10 Kan. 442; *Morris v. Masons,* 68 Tex. 698, 703, 5 S. W. 519; *Cincinnati College v. State,* 19 Ohio, 110; *State ex rel.*

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Adm'rs v. Board of Assessors, 35 La. Ann. 668; *County Comm'rs v. Sisters of Charity,* 48 Md. 34; *Louisville v. Board of Trade,* 90 Ky. (2d ed.) 409, 14 S. W. 408; *Trustees v. Boston,* 120 Mass. 212; *Auburn v. Y. M. C. A.* 86 Me. 244, 29 Atl. 992; *People ex rel. Gore v. Y. M. C. A.* 157 Ill. 403, 41 N. E. 557; *Trustees v. Exeter,* 58 N. H. 306; *Y. M. C. A. v. Donohugh,* 13 Phila. 12. We find nothing in Wisconsin to conflict with this volume of authority elsewhere. Appellant urges on our notice *St. Joseph's Hosp. Asso. v. Ashland Co.* 96 Wis. 636, 72 N. W. 43, but that case dealt wholly with the construction of the phrase "used for pecuniary profit" found in subd. 3, sec. 1038, Stats. 1898, and is without applicability to the present subject.

Our attention is called to several cases holding that temporary letting of a building or a hall, the whole of which is actually occupied and used for charitable or educational purposes, is not inconsistent with its exclusive use within a statute like ours; as, for example, the letting of seminary buildings for hotel purposes during the vacation, or the letting of a Masonic or other hall for lectures when not required for the uses of the society owning it (*Temple Grove Sem. v. Cramer,* 98 N. Y. 126; *St. Mary's Church v. Tripp,* 14 R. I. 307; *First U. Soc. v. Hartford,* 66 Conn. 368, 34 Atl. 89; *Philadelphia v. Barber,* 160 Pa. St. 123, 28 Atl. 644); also to cases where parts of school buildings or charitable establishments are used for living rooms by teachers, workers, or janitors, without destroying the exemption (*People ex rel. Cairns v. Murray,* 148 N. Y. 171, 176, 42 N. E. 584). There may well be legitimate distinction between such use incidental to and promotive of the main purpose for which a building is primarily devoted and the permanent leasing of parts of the building for uses having no relation to the owner's principal purpose; but neither the existence nor exact location of any such line of distinction need be considered or decided in this case, for the

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leasing of the saloon and barbershop, we are convinced, precludes the conclusion that the building in question is exclusively used for educational purposes.

3. An opinion filed by the trial judge suggests a severance of the property in some way so that part may be taxed and part exempted. Counsel on both sides seem to concede the impossibility of such act, and we think advisedly. The property in question is a single nonseverable building together with the ground on which it stands. Only when the "property" is exclusively used for educational purposes can it be exempt at all. It seems obvious that a single indivisible piece of property cannot, in any proper sense, be exclusively so used when parts of it are permanently occupied for other purposes. True, some courts have held that there might be a valuation and assessment of the part used for noneducational purposes, but usually by virtue of some procedure for severance authorized by legislation. The weight of authority is, however, the other way. *Wyman v. St, Louis,* 17 Mo. 335; *St. Mary's College v. Crowl,* 10 Kan. 442. With that view this court is in accord, so far as it has spoken. Thus, in *Phelps v. Rooney,* 9 Wis. 70, it was held that a part of a building occupied as a homestead could not be severed from parts not so used, as a store on the first floor, for the reason that the part not used as a homestead could not be sold on execution consistently with the practical retention and enjoyment by a debtor of the living rooms above and the ground beneath. In that case we repudiated a contrary holding in Iowa (*Rhodes v. McCormick,* 4 Iowa, 368), whereby, in the words of a witty writer, the home of a family was "hung in the air like the nest of a bird." Again, in *Milwaukee & St. P. R. Co. v. Crawford Co.* 29 Wis. 116, 125, where part of a building was used for proper railway purposes and part not, it was declared impracticable to sever for purposes of taxation. That is obviously so under our present laws for levy and enforcement of taxes on real estate which provide no rule or process for either valuing or

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selling any fractional interest or any, other than vertical, section of land with a single building upon it. *Merrill R. & L. Co. v. Merrill,* 119 Wis. 249, 96 N. W. 686. Until some such provision is made we must hold that the whole of an indivisible building, and the ground on which it stands, is subject to taxation unless the whole is rendered exempt by being used exclusively for educational purposes in the natural and exact significance of those words.

The views thus announced absolve us from consideration of several argued or suggested questions, such as the strictly educational character of Turner societies; the constitutionality of individual exemptions from taxation by private laws; also the validity and effect of certain portions of the Milwaukee charter. We therefore leave them untouched.

By the Court.—Order appealed from is affirmed.

PATTERSON, Respondent, vs. CAPPON, Appellant.

September 17—October 9, 1906.

Tax titles: Second tax deed to same grantee: Effect on former deed: Judgment: As to what matters conclusive: Appeal: Findings of fact: Presumption as to correctness.

1. Where the grantee in a tax deed secures a second deed on a tax certificate issued prior to his first deed but based on taxes subsequent to those on which his first deed is based, the second deed does not cut off and extinguish his title and interest under the first; and one to whom said grantee afterwards conveys the land may claim title under said first tax deed.
2. In an action to quiet title, brought by one claiming under a tax deed, defendant tendered the defense to the original owners at the time the taxes were levied, who had warranted the title, but they neglected to defend. Plaintiff had judgment, and defendant then brought action against said original owners for breach of the covenant of warranty. *Held,* that the judgment quieting title was conclusive in the later action as against the

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claim of said covenantors that the purchase at the tax sale was for the benefit of the covenantee.

3. Where a deed was in evidence and is referred to, but not included, in the bill of exceptions, a finding of the trial court that by such deed the grantee assumed payment of a certain mortgage on the land as a part of the consideration for the conveyance, will be presumed to be correct.

Appeal from a judgment of the superior court of Milwaukee county: J. C. Ludwig, Judge. *Affirmed.*

An action to recover damages for breach of the covenants of a deed. The facts of the case as alleged in the complaint are fully stated in the case on a former appeal to this court, reported in 125 Wis. 198, 102 N. W. 1083. The issues tried were (1) whether or not the plaintiff was evicted as alleged. (2) Did plaintiff suffer damages if evicted and how much? (3) Was the purchase by Smith from Heller, the tax-title claimant, a purchase for and by the plaintiff? The findings of the court and the evidentiary facts are fully covered by the court's findings and serve to present the material facts involved. The court found in substance:

On February 14, 1894, defendant and his wife deeded to John Debus the lot in question for a consideration of $700. This deed was duly recorded. It contained covenants that the grantors were well seised of the premises as of a good, absolute, and indefeasible estate of inheritance in fee simple; that the premises were free and clear of incumbrances, except a recorded mortgage of $400; and that the grantors would forever warrant and defend the premises in the quiet and peaceable possession of the grantee, "his heirs and assigns, against all and every person or persons lawfully claiming the whole or any part thereof." On March 12, 1895, Debus and wife deeded the lot to plaintiff in consideration of $204 then paid them and the assumption by him of the $400 principal of the mortgage and $14 unpaid interest. The deed contains full covenants of warranty, excepting this

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mortgage. When this deed was delivered Debus delivered to plaintiff the deed he had received from defendants. At the time of the sale and transfer of the lot from defendants to Debus the taxes which had been assessed and levied for the year 1893 remained unpaid, and the lot was sold for this unpaid tax May 15, 1894, to one Simon Heller, who received the tax-sale certificate, and on October 20, 1897, received a tax deed of this lot from Milwaukee county, on this certificate, which then stood unredeemed. The deed was recorded in the register of deeds' office for Milwaukee county on October 21, 1897. Plaintiff was first notified of this outstanding tax-sale lien and deed in July, 1903, and he immediately thereafter notified defendants thereof and demanded that they procure the tax title for him. This they refused to do. The lot was unoccupied at the time of the levy and sale for taxes and when the deed issued, and it remained unoccupied until the year 1903, when Simon Heller went into actual possession by cultivating and raising a crop of grain on it. On October 5, 1903, Heller conveyed his title and interest in the lot to one Darwin W. Smith by special warranty deed. On October 8, 1903, Smith brought an action in Milwaukee county circuit court against plaintiff to quiet title to the lot, and on October 10, 1903, plaintiff served a copy of the summons and complaint in the action on defendants, with a notice of facts on which the action was based, and that he would look to defendants to make good their covenants in their deed to Debus. He therein tendered defendants the defense of the action brought by Smith. The defendants refused and neglected to defend this action. On October 30, 1903, the court awarded judgment that Smith was the owner in fee of the lot, and quieted title to it as against plaintiff. Smith has held possession under the deed and judgment. The plaintiff was dispossessed by Heller at the time he recorded his deed.

The court found that plaintiff had paid $204 at the time

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Debus delivered the deed of the lot to him, and that he thereafter paid the mortgage of $400, principal, and $14 interest, making a total of $618, the amount of his damages caused by defendants' breach of the covenant of their deed of quiet and peaceable possession of the lot. Mary E. Cappon was the wife of *Jesse Cappon* when they gave their deed to Debus, and she signed the deed only to bar her right of dower in the lot. Smith bought the lot at the request of Charles T. Hickox, who was then plaintiff's attorney. The plaintiff refused to purchase from Simon Heller or have anything to do with such transfer by Heller to Smith. He had no interest in the transfer, and is in no way interested in or benefited by it. On May 25, 1898, Milwaukee county gave a tax deed to Simon Heller of this lot on a tax-sale certificate for the taxes of 1894, which deed was recorded in the proper office in Milwaukee county on the same day.

Upon these facts the court held that plaintiff was evicted from the lot; that such eviction was a breach of the covenants of defendants' warranty deed to Debus; that these covenants were transferred to plaintiff by the deed from Debus and vested him with the right of action growing out of the breach; that they were broken by plaintiff's eviction from the lot by Heller when he recorded his first tax deed; that Smith is now the successor in title and ownership of the interest acquired by Heller; that plaintiff has been, and is now, evicted from the lot and has suffered the damages claimed by him, namely, the sum of $618, the amount he paid as purchase price for the premises; and that the purchase by Smith was not by or for the benefit of plaintiff. Judgment was awarded that plaintiff recover from defendant *Jesse Cappon* the sum of $618, the purchase price paid for the lot, with interest thereon from October 21, 1897. Defendant appeals from this judgment.

Charles J. Weaver, for the appellant.

Charles T. Hickox, for the respondent.

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SIEBECKER, J. The finding of the court that plaintiff was evicted by the conveyance to Heller under the tax deed from the county for the delinquent tax of 1893 is assailed by appellant upon the ground that the title thus acquired by Heller was extinguished by the taking of a subsequent tax deed based upon the tax sale for the unpaid taxes of 1894. There is no dispute that Heller obtained two tax deeds upon the lot, the first in October, 1897, based on the delinquent tax of 1893, and the second in May, 1898, based on the delinquent tax of 1894. The claim is that, since the second deed was based on a tax levied subsequent to the one of the first tax deed, this second tax deed cuts off all title and interest conveyed by the first tax deed. Such would unquestionably have been the result if the second conveyance had been to another person than the grantee under the first tax deed. No satisfactory reasons are presented showing why such a consequence should follow where the same person takes the two conveyances. If conveyances are made to different persons under such circumstances, it is obvious that the failure of the grantee in the prior tax deed to pay subsequent taxes must result, in legal effect, the same, as regards the state's enforcement of its lien against the land by sale and forfeiture of title, as default by the original owner to discharge this lien against the land. No such consequences are necessarily involved when the tax-title grantee secures a second tax deed on a tax certificate issued prior to his first deed. Under such circumstances the state, having received payment in full of its tax, may convey the title arising out of such sale, the grantees being the same person. The title thus conveyed raises no conflict of adverse interest or ownership, and no revocation or foreclosure of the interest vested under the prior deeds need be effected to grant a clear title by the separate deeds. Under such circumstances there is no obstacle in the law to letting the title and interest covered by each deed stand as the foundation of a grant, unaffected by subsequent conveyances, and

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to treating them as separate conveyances and to allowing any subsequent one to aid whatever infirmity may exist in a prior one. This view was adopted in the case of *Lybrand v. Haney*, 31 Wis. 230, where the tax-deed grantee took deeds on sales for taxes which were subsequent to the one on which the first issued but prior to the issuance of the first deed. The court there said: "Hence the taking of the tax deeds upon the certificates issued on the sales for nonpayment of the taxes for the last-mentioned years, instead of paying such taxes, was no violation of any duty or obligation. Under these circumstances we see no good reason why the plaintiff could not strengthen his title by taking such deeds, or why he may not maintain this action upon them, notwithstanding he may have a good title without them by virtue of the deeds" theretofore issued. This meets appellant's contention that no rights could be claimed under the first tax deed to Heller. We must hold that this first tax deed remains a valid conveyance of the title and that Heller conveyed such title to his grantee, Smith.

It is contended that the purchase by Smith was for the plaintiff's benefit and that he is, in fact, the purchaser under such conveyance. The court found that plaintiff refused to purchase Heller's interest or to become interested in that transaction in any respect after notice that his attorney had furnished Smith the money to purchase the lot, and that he in no way acquired any legal or equitable rights to the premises by virtue of that transfer. The evidence on this subject is not in conflict, and nothing appears to impeach the plaintiff's claim that he absolutely refused to purchase the outstanding tax title or to become a participant in the purchase by Smith for his attorney. No way is suggested and none is perceived of compelling him to take the Smith title and pay the consideration actually received by Heller. The evidence fails to show that plaintiff colluded with his attorney to make this purchase for his benefit or interest. This state of facts

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is conclusive and necessarily refutes appellant's claim that plaintiff is the beneficiary in fact under this sale. Another answer to this contention may be found in the conclusiveness of the judgment in the case of Smith against plaintiff, which adjudges the title to the lot to be in Smith, after plaintiff had notified defendants of the object of this action, had served them with copies of the summons and complaint, and had tendered them the defense in the action.

We must hold that the court's findings on this issue are sustained by the evidence and that the title and possession vested in Heller and his grantee, Smith, and that plaintiff's complaint of an eviction is established. The warranty of peaceable and undisturbed possession, as stated in the opinion on the former appeal, "is, of course, breached by an eviction which deprives the grantee of the possession so warranted, and gives him the right of substantial recovery limited to the original purchase price of the land."

The court awarded damages in the sum of $618, the amount plaintiff alleges he paid to Debus for the land. Appellant claims that this is excessive, and that the item of $414, paid on the mortgage, was improperly allowed. The damages allowed were made up of $204, the sum paid by plaintiff to Debus in money, and the sum of $414, the amount of the mortgage on the land when so transferred and which plaintiff assumed to pay as part of the consideration. The defendants admit the payment to Debus of $204 in money, and allege that the plaintiff paid the mortgage indebtedness, took an assignment of the same, and that such assignment and payment "constituted a payment of said note and mortgage which said plaintiff had assumed and agreed to pay." These admissions are quite clearly to the effect that there was no issue taken with the plaintiff upon the allegation that he actually paid the sum of $618 as the consideration for the lot, and that he assumed the mortgage under the deed from Debus and wife and had paid it before the action was

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commenced. The record, however, discloses that this deed was introduced in evidence and submitted to the trial court, and the court found upon this question that plaintiff by such conveyance assumed payment of this mortgage as part of the consideration for the sale and transfer thereof. The bill of exceptions does not contain this deed; reference is, however, made to it. Under these circumstances it must be presumed that it contained an agreement of the parties showing that plaintiff assumed payment of this mortgage as part of the consideration. *Post v. Roberts,* 127 Wis. 605, 106 N. W. 1099. This in itself is sufficient to sustain the court in its conclusion that plaintiff paid $618 as the purchase price of the land and in holding that the plaintiff paid the mortgage so assumed by him. The amount so paid was a part of the damages in the case, and judgment was properly awarded for the recovery of the sum of $618 and interest.

By the Court.—Judgment affirmed.

SCHNEIDER, Respondent, vs. ESTATE OF BREIER, Appellant.

September 17—October 9, 1906.

Married women: Liability of separate estate for funeral expenses: Statutes construed.

1. Under secs. 3822, 3852, Stats. 1898, the estate of a married woman who dies leaving separate property is primarily liable for her funeral expenses; and the claim therefor may be enforced against such estate without regard to any liability of the husband.
2. Secs. 2341, 2342, Stats. 1898 (providing that the property of a female shall not be liable for her husband's debts), refer to debts which are exclusively debts of the husband, and not to such as are primarily a charge against the separate estate of the wife.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

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Anna Selma Breier died intestate, leaving a separate estate, and was survived by her husband, John Breier, who lived with her as such up to the time of her death. *August F. Schneider,* plaintiff, an undertaker, at the request of the surviving husband, prepared and buried said deceased, and furnished all necessary work, labor, materials, and services, amounting to $145.75, which claim was duly filed against the estate and allowed by the court. An appeal was taken to the circuit court, and the judgment of the county court affirmed, from which judgment this appeal is taken.

For the appellant the cause was submitted on the brief of *C. S. Matteson.* To the point that a husband is liable for the expenses of his wife's funeral, he cited *Sears v. Giddey,* 41 Mich. 590; *Gunn v. Samuel's Adm'r,* 33 Ala. 201; *Smyley v. Reese,* 53 Ala. 89; *Jenkins v. Tucker,* 1 H. Bl. 90; *Ambrose v. Kerrison,* 10 C. B. 776; *Bradshaw v. Beard,* 12 C. B. N. S. 344; *Bertie v. Lord Chesterfield,* 9 Mod. 31; *Meth. E. Church v. Jaques,* 1 Johns. Ch. 450.

For the respondent there was a brief by *Froede & Bodenstab,* and oral argument by *H. H. Bodenstab.*

KERWIN, J. The question involved upon this appeal is whether the estate of a married woman who dies leaving separate property is liable for funeral expenses. It seems to be well settled that estates of deceased persons are liable for funeral expenses such as are usually adopted for persons of like rank and condition in society (2 Woerner, Adm'n, §§ 357, 359; Schouler, Ex'rs, 3d ed. § 421); and this rule applies to married women leaving separate estates to be administered. *Morrissey v. Mulhern,* 168 Mass. 412, 47 N. E. 407; *McCue v. Garvey,* 14 Hun, 562; *McClellan v. Filson,* 44 Ohio St. 184, 5 N. E. 861; *Constantinides v. Walsh,* 146 Mass. 281, 15 N. E. 631. The liability of the estates in such cases does not rest upon contract relation, but upon a charge which the law imposes upon the estate.

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Schouler, Ex'rs (3d ed.) § 421; *McClellan v. Filson, supra.* Sec. 3822, Stats. 1898, provides that "the personal estate of the deceased which shall come into the hands of the executor or administrator shall be first chargeable with the payment of the debts and expenses; . . ." Sec. 3852, Stats. 1898, provides:

"If, after the amount of the claims against any estate shall have been ascertained by the court, it shall appear that the executor or administrator has in his possession sufficient to pay all the debts he shall the pay the same in full within the time limited for that purpose. If the assets received by the executor or administrator, and which can be appropriated to the payment of debts, shall not be sufficient he shall, after paying necessary expenses of administration, pay the debts against the estate in the following order: (1) The necessary funeral expenses; . . ."

It will be observed that the statutes respecting the payment of funeral expenses apply to all estates without exception. There can be no doubt, therefore, that the intention of the legislature was to include estates of married women leaving separate property which passed into the hands of their personal representatives for administration and distribution. It is also very clear from these statutes that funeral expenses are treated as a debt of the estate, and apply alike to all estates being administered. This is the construction given to statutes similar to our own in other states. *McClellan v. Filson, supra; Constantinides v. Walsh, supra.*

The main contention, however, on the part of counsel for appellant is that the husband is liable for the funeral expenses of his deceased wife, and that in the case before us he ordered them and became primarily liable therefor, and hence the action cannot be maintained against the estate of the wife. It appears that the husband ordered the material and labor to be furnished and performed, but the court found that the work, material, and labor furnished and services rendered were not given upon the credit of the husband, but

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solely upon the credit of the estate. The question of whether the husband would be liable in a proper case is not before us and is unnecessary to consider here. The case turns upon the proposition of law as to whether or not the estate is primarily liable, and we think it clear under the statutes of this state and the decisions in others under substantially similar statutes that the estate is primarily liable, and that the claim for funeral expenses may be enforced against it without regard to the liability of the husband. Schouler, Husb. & W. § 413; *McClellan v. Filson, supra; Constantinides v. Walsh, supra; McCue v. Garvey,* 14 Hun, 562.

It is argued by counsel for appellant that it was the undoubted intention of the legislature in the passage of the laws respecting married women to wholly exempt their property and estates from the operation of sec. 3852, Stats. 1898. We do not so understand it, but, on the contrary, think sec. 3852 was clearly intended to apply to all estates, and that there is nothing in the statutes relating to married women inconsistent therewith. Morever, the general current of authority is to the effect that estates of all persons are made primarily liable for funeral expenses. The statutes cited by counsel, secs. 2341 and 2342, manifestly refer to debts which are exclusively those of the husband, and not such as are primarily a charge against the separate estate of the wife. The charge for funeral expenses against the estate of a married woman where she leaves separate property is primarily a charge against her estate.

It follows that the judgment of the court below is right, and should be affirmed.

By the Court.—Judgment affirmed.

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PAYNE, Respondent, vs. PAYNE and wife, Appellants.

September 12—November 7, 1906.

Contract for support: Enforcing contribution: Necessary parties: Plea in abatement: Contract construed: Married women: Contract benefiting separate estate: Evidence: Competency: Husband and wife: Agency of wife: Special verdict: Form of questions: Court and jury.

1. Where several persons contracted to support a woman during her life, each being bound in the same degree, and one of them discharged the obligation alone, he is entitled to contribution and may enforce it in a legal action.
2. The plaintiff in such a case may enforce his claim for contribution against any one or more of the persons liable to him for their proportionate shares, and the other persons so liable are not necessary parties to the action.
3. Where in such a case defendants in the action for contribution had given a mortgage of land to secure performance of the contract for support, a third person who had afterwards purchased the land and assumed the lien of the mortgage is not a necessary party to the action, there being nothing to show that he assumed the personal liability of his grantors to contribution.
4. Allegations of an answer that certain third persons are necessary parties are, under sec. 2667, Stats. 1898, to be deemed controverted by the plaintiff, and the issue thereon may be tried with the general issues, in the court's discretion, under Circuit Court Rule XIV.
5. A contract executed by two husbands and their wives for the support of the wives' mother, providing that she should have the privilege of living with either family as she should elect and for such time as she desired, is construed as binding all the parties to furnish the support wherever the mother might choose to reside, and not as putting the whole burden upon those with whom she did reside.
6. A contract by a married daughter having separate estate and by others for the support of her mother during life, which protected such daughter from liability under the statute to furnish such support in case her mother should become unable to support herself, operated to the benefit of the daughter's separate estate, and she was therefore bound thereby.
7. In an action to enforce contribution from persons who had contracted jointly with plaintiff to support a certain person, evi-

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dence as to the comparative value of two pieces of land which had been conveyed to plaintiff and one of the defendants respectively in consideration of their joining in the contract, as to the health of the person supported while she lived with plaintiff, as to the value of the support which he furnished her, and as to her fear of one of the defendants, is *held* to have been material and competent.

8. The fact that plaintiff's wife, in the usual course of the management of the household affairs, attended to the details of procuring provisions, etc., and performed the labor incident to furnishing support for a person in their house, did not show that she was the agent of her husband in the matter of such support so as to make her a competent witness for the defense in an action by the husband to enforce contribution from other persons jointly bound with him to furnish such support.

9. A question for special verdict, asking what was the real value of support furnished to a person over and above the value of her services in the household, covered but one issuable fact and was not objectionable.

10. The terms of a contract for support not being in dispute, its construction was for the court, not for the jury.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Plaintiff brings this action to enforce contribution against the defendants for their failure to perform the obligations of a contract, made by himself and wife and the defendants, for the support of Bridget Cuddy, who is the mother of his wife and the defendant *Catherine Payne.* He alleges that by reason of the defendants' failure to perform their part of this contract he was compelled to support Mrs. Cuddy and to incur expenses in excess of his proportion under it, and he therefore demands contribution from the defendants of their proportionate shares of the expenses he has so incurred. It appears that Bridget Cuddy, her two daughters, Mary Payne and the defendant *Catherine Payne,* and W. T. Cuddy, her son, had the title to and interest in lands left them by their deceased husband and father, and that the daughters and their husbands, *George* and *Albert Payne,* entered into a written contract with Bridget Cuddy, the mother, in 1884, for her

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support and care for the remainder of her life. In consideration of their entering into this agreement and the payment of $400 each by *George* and *Albert Payne,* Bridget Cuddy, *Catherine Payne,* and W. T. Cuddy conveyed their interest in sixty-four acres of this land to the plaintiff; and Bridget Cuddy, Mary Payne (plaintiff's wife), and W. T. Cuddy conveyed their interest in a remaining forty acres to the defendant *Albert Payne.* To secure the performance of the agreement for Bridget Cuddy's support, Mary and *Catherine Payne* made and executed a mortgage on lands owned by them separately, which mortgage was also signed by their husbands. The agreement for the support of Bridget Cuddy was to the effect that her support and care and the expense of her burial should be furnished by the parties to this contract, namely, the plaintiff and his wife and the defendants. Bridget Cuddy had the right and privilege of living with plaintiff's or defendants' family as she should elect and for such time as she desired. She lived with the plaintiff or the defendants from the time this agreement was made until her death in May, 1903. Plaintiff alleges that for more than the six years immediately preceding the commencement of this action defendants wholly failed and neglected to perform any part of their obligations under this agreement, and that he was compelled to furnish all the care and support of Bridget Cuddy, and he therefore demands contribution from the defendants for their proportionate share of the expenses so incurred by him.

The defendants allege full performance of the contract on their part. They also allege that Mary Payne, plaintiff's wife, is a necessary party to this action, and that since the lands covered by the mortgage given by Mary and *Catherine,* the daughters of Mrs. Cuddy, have been sold and conveyed to W. T. Cuddy, he has assumed the lien created by the mortgage and should be made a party to the action. Neither Mary Payne nor W. T. Cuddy was made a party to the action.

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The case was tried before the court and a jury upon the issues so raised by the pleadings. The jury returned the following special verdict:

"1. What is the reasonable value, over and above the reasonable value of her services in the household and family of the plaintiff, if anything, of the support and care furnished to Bridget Cuddy by the plaintiff and his wife from January 7, 1899, to her death on May 18, 1903? *A.* $672. 2. What is the reasonable value of the support and care furnished by the defendant *Albert Payne* and his wife during the period fixed by the first question? *A.* $5. 3. What is the reasonable value, over and above the reasonable value of her services in the family and household of the plaintiff, if anything, of the support and care furnished to Bridget Cuddy by the plaintiff and his wife from October, 1888, to January 7, 1899? *A.* Nothing. 4. What is the reasonable value of the support and care furnished to Bridget Cuddy by *Albert Payne* and his wife during the period fixed by the third question? *A.* $70."

The court deducted $75 as the total value of the support and care furnished by defendants to Bridget Cuddy during the period of the contract from the total amount furnished by the plaintiff within the six years immediately preceding the commencement of this action, and awarded judgment in plaintiff's favor for one half of the balance, as the amount to be contributed by the two defendants for the support and care of Mrs. Cuddy under the contract. This is an appeal from such judgment.

Daniel H. Grady, for the appellants.

J. H. Rogers, for the respondent.

The following opinion was filed October 9, 1906:

SIEBECKER, J. Plaintiff rests his right to recovery upon an implied obligation flowing from the contract for Mrs. Cuddy's support and care, under which the plaintiff and each one of the other parties was bound in the same degree to discharge the common burden. He avers that for more than six

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years before the commencement of this action he in fact discharged this obligation alone, and he demands that the defendants contribute their shares by reimbursing him for the excess he has paid on account of their failure to perform their part of the common obligation. The right to contribution under similar circumstances is well established and its enforcement in legal actions has been sustained in the decisions of this court. *Bushnell v. Bushnell,* 77 Wis. 435, 46 N. W. 442; *Mason v. Pierron,* 63 Wis. 239, 23 N. W. 119; *Faurot v. Gates,* 86 Wis. 569, 57 N. W. 294. See, also, the following cases in other jurisdictions: *Jacobsmeyer v. Jacobsmeyer,* 88 Mo. App. 102; *Odiorne v. Moulton,* 64 N. H. 211, 9 Atl. 625; *Fletcher v. Grover,* 11 N. H. 368; *Power v. Rees,* 189 Pa. St. 496, 42 Atl. 26.

The defendants insist that since plaintiff's wife is a party to the contract the court erred in denying their request to make her a party to this action. From the foregoing statement it clearly follows that plaintiff is entitled to enforce his alleged claim for contribution, and that he may do this by proceeding against any one or more of the persons liable to him for their proportionate share without proceeding against all persons so liable to him. It is apparent that plaintiff's wife, as one of the parties equally bound on the face of the agreement by the common burden, was not a necessary party to the action against the defendants to recover from them their proportionate shares of the amount due plaintiff under the contract. The claim that W. T. Cuddy should have been made a defendant in this action, upon the ground that he had assumed the lien of the mortgage given by Mary and *Catherine Payne* on their separate real estate, which he thereafter purchased, to secure the performance of the contract, is not well founded. This is not an action to enforce the mortgage security in favor of Mrs. Cuddy, but one for the enforcement of the personal liability of the parties to contribute their proportionate shares of the contract obligation. There is noth-

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ing to show that W. T. Cuddy assumed this personal liability of the defendants.

Defendants requested that plaintiff's wife and W. T. Cuddy be made parties to the action, upon the ground that they are proper and necessary parties to a final determination of the questions presented under the allegations of the answer. It is contended that the allegations of the answer showing that they are necessary parties to the action constitute pleas in abatement, and that, since plaintiff failed to reply to them, they stand admitted, and therefore defendants' request that they be made parties should have been granted. The court refused the request, and treated these allegations of the answer as new matter at issue without a reply, and tried the questions raised by them with the general issues in the case. Under sec. 2667, Stats. 1898, any allegation of new matter, not pleaded as a counterclaim, is to be deemed controverted by the adverse party. All special rules governing pleas in abatement and bar at the common law have been modified by the Code, and matters pleaded, whether in bar or in abatement, are to be alleged in one answer and may be tried together in the court's discretion, under the Code and Circuit Court Rule XIV. *Roys v. Lull,* 9 Wis. 324; *Wood v. Lake,* 13 Wis. 84; *Canfield v. Watertown F. Ins. Co.* 55 Wis. 419, 13 N. W. 252; *Freeman v. Carpenter,* 17 Wis. 126; Bliss, Code Pl. §§ 3–5; Pomeroy, Code Rem. §§ 697, 698.

It is urged that error was committed because the court held that the evidence establishing the contract was not disputed and that by its terms plaintiff and his wife and the defendants became jointly and severally bounden to furnish support and care to Bridget Cuddy as therein stipulated, and that Bridget Cuddy had the right to live at the home of either the plaintiff or the defendants at such times and for such periods as she might desire. It is obvious that this contract was entered into by Mary and *Catherine Payne,* daughters of Bridget Cuddy, in order to assure to their mother support

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and care for the remainder of her life, and that she should have the privilege of living at their respective homes if she so chose, and that the daughters, in consideration of such support and care, joined in a conveyance of the real estate, jointly owned by them, their mother, and brother, to their respective husbands, *George* and *Albert Payne,* who, in consideration of the transfer of this real estate to them, joined in the contract for support. The terms of the agreement, in the light of these facts and circumstances, clearly indicate that the parties to it were obligated to furnish the mother the care and support stipulated wherever she might choose to reside, and that it was not contemplated or agreed that such support was to be furnished solely at the expense of the party with whom she resided. To construe the contract as appellant contends would give its terms a special and strained significance which they do not naturally import, and would conflict with the apparent intentions of the parties.

It is urged that the defendant *Catherine Payne* could not bind herself at law as a party to this agreement, since it in no way affected her separate property or business. The contract made provision for the mother's support and care for life. It seems she contributed to this object to the extent of transferring her interest in the lands conveyed to *George* and *Albert Payne.* Yet the parties evidently did not consider this a sufficient consideration to compensate for the undertaking, and the daughters obligated themselves to share this burden with their husbands equally by joining in the contract, and they secured its performance by pledging their separate estates under a mortgage. The fact that Bridget Cuddy was provided support and care for life by this transaction, which protected her daughters from liability under the statutes for furnishing her support in case she should become unable to maintain herself, furnishes good grounds for the taking of such steps as they might deem proper to protect themselves and their separate estates from such liability.

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Her support and care under this contract therefore operated to the benefit and advantage of her daughters' separate estates, and thus enabled them to make a contract in respect thereto, and brings the transaction within the class covered by the statute removing the common-law disabilities of married women to make binding contracts. *Kriz v. Peege,* 119 Wis. 105, 95 N. W. 108; *Citizens' L. & T. Co. v. Witte,* 116 Wis. 60, 92 N. W. 443; *Mueller v. Wiese,* 95 Wis. 381, 70 N. W. 485; *Stack v. Padden,* 111 Wis. 42, 86 N. W. 568.

A number of exceptions to the reception of testimony are urged upon our attention. Plaintiff testified to the respective values of the two pieces of land conveyed to him and the defendant in consideration of their assuming to aid in the support and care of Bridget Cuddy; as to her condition of health while she resided at his house, and the reasonable value of the support which he furnished her during the period for which he sued. The reception of this evidence as well as that of George Payne, Jr., concerning Mrs. Cuddy's fear of the defendant, is urged as prejudicial because the witnesses had no knowledge on the subject, and because it had no relevancy to the issues tried. An examination of the exceptions discloses that the evidence was material and competent, and that the witnesses testified from personal knowledge.

Other exceptions were urged against the rejection of evidence offered by defendants of conversations with W. T. Cuddy as to his assumption of the mortgage obligation and of proof tending to show ill feeling between all the parties. The record shows that this evidence was either wholly immaterial or so slightly related to the issues litigated that no prejudice resulted from its exclusion. Defendants called the plaintiff's wife as a witness in the case upon the ground that she acted as his agent in furnishing the support and care to Mrs. Cuddy for which he asked to be compensated, and as therefore competent to give evidence of the nature and kind of support and care he furnished. We find no support for

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this contention. Plaintiff's wife undoubtedly attended to the details of securing the provisions and other necessaries and performed the labor incident to furnishing the support and care for her mother in plaintiff's household; this was done in the usual course in the management of the household affairs that she assumed and performed as plaintiff's wife, in keeping house for him and his family in the customary way. It in no way tends to show that the relationship of principal and agent existed as to these matters between the husband and wife. Defendants' counsel asked her generally, while testifying, whether her husband, the plaintiff, had sent any communication to the defendants or either of them through her. The court ruled that no basis of her agency was shown, and sustained an objection to the question. No suggestion was made to the court that this inquiry pertained to anything pertinent and material to the case, nor was there an offer to confine it to a competent and material subject. Hence the ruling must be sustained.

It is claimed that the first question of the special verdict is double, in that it covers two separate issuable facts, and that it is therefore objectionable. The question can bear no such construction. The inquiry covered by it is plain, covers but one question, and admits of a direct answer by the jury.

It is further contended that the court erred in refusing to include in the special verdict two questions requested by the defendants, whereby the jury were asked to find whether Bridget Cuddy had the right to choose whether she would reside with the plaintiff or the defendants, and whether the defendants were liable under the contract for one half of the value of her support and care. We think the court very properly refused to submit these two questions. As above stated, the contract was not in dispute under the evidence, and it devolved upon the court, under the uncontradicted evidence on the subject, to construe it.

The exceptions argued pertaining to the direction of a ver-

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dict for the plaintiff, to instructions given, and to the refusal to change the answers to questions of the special verdict are sufficiently covered by the foregoing considerations. We find, under the evidence, the amount of damages recovered to be reasonably within the facts of the controversy, and the finding of the jury and the action of the court in refusing to change the verdict must be sustained. No question was raised as to the right to take judgment against the defendants jointly in this action, and therefore this question is not properly here for review. The record shows no prejudicial error.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied November 7, 1906.

THE STATE, Respondent, vs. SCHAEFFER, Appellant.

October 9—November 7, 1906.

Physicians and surgeons: Annulment of license or certificate for fraud: Retroactive statute: Validity: Limitation of actions: Parties.

1. Ch. 422, Laws of 1905 (giving circuit courts power to annul any license or certificate of registration issued to any person to practice medicine "who is guilty of immoral . . . conduct after the passage of this act or who has procured such license or certificate . . . by fraud or perjury, or where the same was obtained through error"), is so far retroactive as to authorize annulment of the certificate of a person practicing medicine after the passage of the act where he had procured such certificate by fraud or perjury or through error before such passage.
2. Such act, so construed, is not an *ex post facto* law, the annulment of the certificate not being in the nature of a punishment but intended only for the protection of the public against incompetency and unfitness.
3. The civil action in the name of the state, authorized by ch. 422, Laws of 1905, to annul a license or certificate of registration issued to a person to practice medicine, is not an action to enforce a penalty or forfeiture; and the time for the commence-

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ment thereof is not limited by secs. 4222, 4224, 4629, or 4630, Stats. 1898.

4. The fact that the complaint in such an action is signed by an attorney for the Wisconsin board of medical examiners, as well as by the district attorney, does not make such board a party plaintiff, or render the complaint demurrable on the ground of defect of parties.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action under ch. 422, Laws of 1905, to annul a certificate of registration issued by the Wisconsin board of medical examiners. The action is brought in the name of the state as plaintiff. The complaint begins as follows: "And now comes the above-named plaintiff [state of *Wisconsin*] by Francis E. McGovern, district attorney for Milwaukee county, and A. C. Umbreit, attorney for the Wisconsin board of medical examiners, and complains of the above-named defendant." The complaint is signed by "Francis E. McGovern, District Attorney," and by "A. C. Umbreit, Attorney for Wisconsin Board of Medical Examiners."

Defendant demurred to the complaint on the grounds (1) that it did not state facts sufficient to constitute a cause of action; (2) that there is a defect of parties plaintiff in that the Wisconsin board of medical examiners should not have been joined as plaintiffs; (3) that the action is barred by limitation, specifying subd. 1, 4, sec. 4224, subd. 7, sec. 4222, and secs. 4629, 4630, Stats. 1898. The trial court overruled the demurrer, and defendant appealed.

John Toohey, for the appellant, contended, *inter alia,* that defendant obtained his certificate September 25, 1899, under ch. 87, Laws of 1899. The only punishment inflicted at the time for any fraudulent representation was that prescribed in sec. 6 of said act, viz., a forfeiture of $50. The right to enforce such penalty was limited to two years by subd. 1, sec. 4224, Stats. 1898. See sec. 4229. The only power of

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revocation which existed at the time defendant obtained his certificate was contained in sec. 1435*b*, Stats. 1898, and that was barred at the end of three years by sec. 4630. Defendant had a vested right which the law of 1905, if held constitutional, would deprive him of. At least the right of defense had vested in the defendant and cannot be taken away from him by the law of 1905, because it would be impairing and taking away a vested right, for the right of defense is a property right under the decisions of this court. *Eingartner v. Ill. S. Co.* 103 Wis. 373, 376; *Corbett v. Joannes,* 125 Wis. 370, 380. The Wisconsin board of medical examiners, through its attorney, has joined as plaintiff in the action. While, as a general rule, a demurrer for defective parties will not lie for excess of parties, yet where, as here, no costs could be taxed against the board as plaintiff, the demurrer should be sustained. *Read v. Sang,* 21 Wis. 678.

For the respondent there was a brief by *A. C. Umbreit,* attorney for Wisconsin board of medical examiners, and *F. E. McGovern,* district attorney, and the cause was argued orally by *Mr. Umbreit.* They argued, among other things, that under ch. 1, Laws of 1905, the time limited for the commencement of actions of this kind by the state is ten years, and the statutes cited by appellant are inapplicable. The right to practice medicine is not a vested or property right, but is practically a mere privilege. *State ex rel. Kellogg v. Currens,* 111 Wis. 431. The regulation of the practice of medicine is within the police power of the state, and hence no person can secure a vested or property right in such practice. *Meffert v. State Board,* 66 Kan. 710, affirmed 195 U. S. 625; *Hawker v. New York,* 170 U. S. 189; *State ex rel. Powell v. State Med. Exam. Board,* 32 Minn. 324. The Wisconsin board of medical examiners is not a party plaintiff. The fact that its attorney subscribed the summons and complaint as such attorney does not make the board a party.

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CASSODAY, C. J. This is an action commenced December 21, 1905, to revoke and annul the certificate of registration issued to the defendant by the Wisconsin board of medical examiners September 25, 1899, pursuant to ch. 87, Laws of 1899. The action was instituted by the district attorney upon a verified complaint in writing being made to him December 18, 1905, by the secretary of said board, charging the defendant with having procured such certificate by fraud and perjury and through error, as specified in ch. 422, Laws of 1905. The complaint alleges, among other things, in effect, that the defendant is and had been for more than five years prior to the commencement of this action a resident and practicing physician and surgeon in the county by reason and virtue of such certificate; that the defendant procured such certificate by exhibiting to the members of the board a document or paper purporting to be a diploma from the Collegium Medicinæ Independentiæ of Chicago, thereby representing that he was entitled to practice medicine and surgery and that such diploma was issued by a reputable, *bona fide* medical college, whereas, in truth and in fact, the same was a corporation chartered in 1896 and conducted for pecuniary considerations only, without regard to the qualification or fitness of the applicant to practice medicine, and conferred degrees upon persons wholly unfit and incompetent to engage in such practice; that the charter of said corporation was revoked by the judgment of a court in Chicago on February 1, 1899, and such judgment was affirmed by the supreme court of Illinois on October 10, 1899; that in his application for such certificate prior to September 25, 1899, the defendant falsely stated and represented, in effect, that he was for three years at the medical department of the University of Prague and a graduate thereof and held a diploma therefrom, and that he was for half a year at the Chicago institution mentioned and a graduate thereof and held a diploma therefrom; that such statements were false and untrue,

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and in making the same the defendant was guilty of wilful and corrupt perjury for the purpose of deceiving said board and thereby obtained said certificate of registration; that said board was misled and deceived by the fraud, perjury, and misrepresentation so committed by the defendant and thereby induced to issue such certificate September 25, 1899, at which time the defendant was not a reputable resident physician or surgeon of good moral character who had prior to July 1, 1897, been in actual practice of medicine or surgery in this state, as mentioned in the statutes cited, and that no such certificate would have been issued except for such fraud, perjury, and misrepresentation; that such certificate was issued through error and mistake on the part of said board and under the belief of the board that the defendant was at the time a reputable resident physician or surgeon of good moral character who had been on July 1, 1897, in the actual practice of medicine or surgery in this state, and that he held a *bona fide* diploma from a reputable medical college; that by reason of such error and mistake said certificate was issued by said board. The defendant demurred to such complaint. This is an appeal from an order overruling such demurrer.

1. Ch. 422, Laws of 1905, among other things, declares:

"The circuit courts of this state are hereby vested with jurisdiction and power to revoke and annul any license or certificate of registration which has been *heretofore* or which may be *hereafter* issued to any person to practice medicine or surgery, or osteopathy in this state, who is guilty of immoral, dishonorable or unprofessional conduct, after the passage of this act or who has procured such license or certificate of registration by fraud or perjury, or where the same was obtained through error."

That act went into effect June 23, 1905, and this action was commenced six months afterwards. Counsel for the defendant contends that the act is not retroactive, and therefore that the complaint does not state a cause of action. This is

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based upon the claim that "the words 'after the passage of this act,'" in the portion of the act above quoted, "qualify the entire clause" so quoted. And so it is claimed that "not only must the dishonorable and unprofessional conduct" therein mentioned "occur after the passage" of the act, "but also that the fraud, perjury, or error for which it is sought to annul the certificate must also have occurred after the passage of the act." In other words, the claim is that the circuit court had no jurisdiction or power to revoke or annul the certificate in question, although obtained by fraud, perjury, and misrepresentation, as alleged, for the simple reason that it was issued prior to the passage of the act in question.

We should be slow to hold that the circuit court has no jurisdiction or power to set aside a certificate of registration thus obtained, even in the absence of the act in question. But it is unnecessary to consider that question here, since the act declares, in effect, that such court may "revoke and annul any license or certificate of registration which has been . . . procured . . . by fraud or perjury, or where the same has been obtained through error." The word "heretofore," in the portion of the act quoted, manifestly refers to "any license or certificate of registration" issued prior to the passage of the act. So the act declares, in effect, that such practitioner "who is guilty of immoral, dishonorable, or unprofessional conduct," as defined therein, "after the passage of the act," may have his license or certificate of registration revoked or annulled, even though it was obtained without fraud or perjury or misrepresentation. The manifest purpose of the act is to prevent any incompetent or unfit person from practicing medicine or surgery or osteopathy, and thus to protect the public from the injuries which might otherwise be incurred. In the case at bar the demurrer admits that at the time of the commencement of this action, December 21, 1905, the defendant was residing in Milwaukee and practicing medicine and surgery therein, and had been so practicing medi-

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cine and surgery therein for more than five years then last past, and was then claiming the right so to practice by reason of said certificate of registration. Thus, it is confessed that the defendant, by reason of said certificate, so practiced medicine and surgery in the county for six months after the passage of the act and before the commencement of this action, as well as for several years prior to the passage of the act. We must hold that the act in question was retroactive to the extent indicated.

2. With such construction counsel contend that ch. 422, Laws of 1905, is unconstitutional and void. That act declares, in effect, that "such action," "to revoke and annul any license or certificate of registration," "shall be commenced and prosecuted as a *civil action* in the name of the state of *Wisconsin* as plaintiff, and against such person complained against as defendant, and the rules of pleading, evidence, and practice in civil actions in the circuit court shall be applicable thereto, and either party may appeal from the circuit court to the supreme court as in other civil actions." We find nothing in the act which imposes a penalty or prescribes a forfeiture. The principal contention is that the act, as thus construed, is an "*ex post facto* law," and hence forbidden by both the federal and state constitutions. Sec. 10, art. I, Const. of U. S., and sec. 12, art. I, Const. of Wis. What is and what is not so prohibited has often been declared by the supreme court of the United States. Thus, it was held by that court long ago, in an opinion by Mr. Justice STORY, that the clause referred to "does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws. It has been solemnly settled by this court that the phrase '*ex post facto* laws' is not applicable to civil laws, but to penal and criminal laws; which punish no party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed. *Ex post facto* laws relate to penal and criminal proceedings which impose

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punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively." *Watson v. Mercer,* 8 Pet. 88. That court, speaking by the present chief justice, has recently stated:

"It may be said, generally speaking, that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or an additional punishment to that then prescribed, or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required, or, in short, in relation to the offense or its consequences alters the situation of the party to his disadvantage. . . . But the prescribing of different modes of procedure, and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition." *Duncan v. Missouri,* 152 U. S. 377, 382, 14 Sup. Ct. 570.

Similar statements were made by Mr. Justice HARLAN, speaking for the whole court, in a still later case (*Gibson v. Mississippi,* 162 U. S. 565, 589, 590, 16 Sup. Ct. 904). The case coming the nearest to the facts of the case at bar of any cited or found is *Meffert v. State Board,* 66 Kan. 710, 72 Pac. 247, affirmed on writ of error to the supreme court of the United States without criticism or comment in 195 U. S. 625, 25 Sup. Ct. 790. It is there held:

"The state, in the exercise of its police power in the interest of the health, good government, general welfare, and morals of the people, may prescribe the qualifications of persons desiring to practice medicine, and may create a board whose duty it shall be to hear and determine any complaint made against any person holding a physician's license and revoke such license for any cause provided for in the statutes. . . . Where the statute prescribes the qualifications of a physician, and proscribes the grossly immoral, and authorizes the cancellation of any certificate issued to such person, the application of this law to one whose habits were grossly immoral before the passage of the law is not in the nature of

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a punishment, and therefore the statute is not *ex post facto,* but has in view only the qualifications of the physician and the protection of public morals." 66 Kan. 710.

The same case holds that such statute is no infringement of the XIVth amendment. In the case at bar defendant received the certificate of registration from the board on the supposition that he was a graduate from each of the institutions mentioned, and so, of course, was possessed of the requisite learning, skill, ability, and character to practice medicine or surgery. That certificate gave to the defendant the special privilege of practicing such profession, and he is still enjoying such privilege. The complaint now is that he procured such certificate by fraud, perjury, and misrepresentation, and hence that the same should be revoked and annulled in order to protect the public from incompetency and unfitness. The question involved concerns not only the defendant but also the public, and in the interest of all should be tried and determined by an impartial tribunal.

3. As indicated, this is not an action to enforce a penalty or forfeiture, but a civil action to set aside a certificate of registration for the reasons stated. We perceive no ground for the claim that the action is barred by the two years' statute of limitation, or the three years' statute of limitation, or any other statute of limitation.

4. This action is brought in the name of the state of *Wisconsin.* The Wisconsin state board of medical examiners is not a party. We perceive no ground for claiming that there is a defect of parties. We find no reversible error in the record.

By the Court.—The order of the circuit court is affirmed.

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KLUG, Appellant, vs. SHERIFFS, Respondent.

October 9—November 7, 1906.

Contracts: Painting of portrait from photographs of deceased person: Breach of trust: Unauthorized painting of second portrait: Property right therein: Rights of privacy.

1. Pursuant to a contract with defendant to paint a portrait of his deceased wife, plaintiff was furnished with two photographs of her to aid him in the work. He painted a portrait from one of them as agreed, and was paid therefor. Without authority he also painted a portrait from the other photograph, and at defendant's request took it to his house, whereupon defendant retained the second portrait and refused to pay for it. *Held*, that the use of the photographs to paint the second portrait was a violation of the contract and a breach of trust and confidence; that plaintiff acquired no property right in such portrait; and that defendant's retention of it did not make him liable as a purchaser. DODGE, J., dissents.

[2. Whether the painting of the second portrait was an invasion of any "right of privacy," not determined.]

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an appeal from a judgment of the circuit court for Milwaukee county dismissing the plaintiff's complaint. The plaintiff, an artist, contracted with defendant to paint a portrait of his deceased wife, and for such purpose, at plaintiff's request, defendant furnished two photographs, one taken indoors, and the other, a group photograph, taken out-of-doors, in which she appeared with others. The photographs were furnished for the purpose of aiding plaintiff in the work. It was agreed between plaintiff and defendant that a portrait should be painted from the "outing" photograph for $175, which was done and the portrait delivered and paid for. A few days after defendant received the portrait plaintiff wrote him that, without any direction, he had painted a portrait of his deceased wife from the "indoor" photograph, and asked whether defendant desired to see it. Defendant, by letter,

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requested that the second portrait be brought to his house, which was done. The painting was never returned or paid for. This action was brought to recover for goods sold and delivered of the alleged value of $190. The case was tried by the court without a jury, and the court found:

"That, without any authority, contract, or permission from said defendant, said plaintiff painted and prepared a second portrait of defendant's deceased wife from the aforesaid photographs, while the same were still in his possession. That after said plaintiff had delivered the first portrait to said defendant and had received the agreed price therefor, he, the said plaintiff, notified said defendant that he had painted a second portrait of defendant's deceased wife from said photographs, and inquired whether said defendant desired to see said second portrait, to which inquiry said defendant replied, and instructed said plaintiff to bring said second portrait to his house; and, in response to said suggestion so made by said defendant, the plaintiff brought said second portrait to the house of defendant, and upon inquiry as to the price of said second portrait stated that the same would be one hundred and seveny-five ($175) dollars, which price said defendant refused to pay him therefor, and also refused to surrender to him, the said plaintiff, the said portrait, for the reason that said plaintiff had received no instruction, authority, or direction to paint same, and the defendant then and there offered to destroy said portrait, which said plaintiff refused to have done. That at the time of the delivery of said portrait as aforesaid, said defendant offered to have the picture removed from the frame which said plaintiff had placed thereon; and, prior to the commencement of this action, the defendant offered and tendered to said plaintiff the frame in which said picture was set, and the plaintiff refused same and still refuses same. That said defendant has ever since said day held himself in position and has been ready and willing to return said frame, but said plaintiff refused, and still refuses, to receive the same. That said plaintiff had no authority to paint said second portrait from the photographs in his possession, thus received for the purpose of painting said first portrait, and that the doing of the same was a breach of faith on the part of said plaintiff, and he acquired no property rights or interest in said picture by reason thereof."

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Judgment dismissing the plaintiff's complaint, with costs, was ordered, from which this appeal was taken.

A. C. Umbreit, for the appellant.

J. W. Wegner, for the respondent.

KERWIN, J. The facts in this case are substantially undisputed, and the questions of law are: (1) Whether the painting of the second portrait was an invasion of the so-called "right of privacy;" and (2) whether the painting of the second portrait was a breach of trust, contract, or confidence, and whether the plaintiff acquired any property in the second portrait.

1. Upon the first proposition, as regards the right of privacy, the authorities seem to leave the question in some uncertainty as to the extent to which courts will go in enforcing the right. In *Atkinson v. Doherty & Co.* 121 Mich. 372, 80 N. W. 285, it was held that equity will not restrain the use of the name and likeness of a deceased person as a label for a brand of cigars named after him, though offensive to the family of the deceased, so long as it does not amount to a libel. In *Schuyler v. Curtis,* 147 N. Y. 434, 42 N. E. 22, it was held that the individual right of privacy, which any person has during life, dies with the person, and any right of privacy which survives is a right pertaining to the living only. In this case the plaintiff brought an action to restrain defendants from making a statue or bust of deceased, Mrs. Schuyler, or from receiving subscriptions for the purpose of defraying the cost of making the same, and also restraining them from using the name of Mrs. Schuyler or circulating any description of her in connection with the "Woman's Memorial Fund Association." The action was brought by relatives of Mrs. Schuyler, and it was held that the action could not be maintained, it appearing that the motive of the parties interested in erecting a bust was to do honor to the memory of the deceased. Again, the question was considered by the court of appeals of New York in *Roberson v. Rochester F. B. Co.* 171

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N. Y. 538, 64 N. E. 442, Chief Justice PARKER writing the opinion, in which he reaches the conclusion, substantially:

"An individual's so-called right of privacy, founded upon the claim that he has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise, does not exist in the law, and is not enforceable in equity. . . . An injunction cannot be granted to restrain the unauthorized publication and distribution of lithographic prints, or copies, of a photograph of a young woman as part of an advertisement of a legitimate manufactured article, where there is no allegation that the picture is libelous in any respect; but, on the contrary, the *gravamen* of the complaint is that the likeness is so good that it is easily recognized, and that it has been and is used to attract attention to the advertisement upon which it is placed, although the publication has caused her great mental and physical distress, necessitating the employment and attendance of a physician."

There is, however, in each of these cases a vigorous dissenting opinion by Justice GRAY. In the late case of *Pavesich v. New England L. Ins. Co.* 122 Ga. 190, 50 S. E. 68, the supreme court of Georgia approves the doctrine laid down in the dissenting opinion of Justice GRAY in the New York cases, and, in a very able and exhaustive opinion reviewing the cases, holds that the right of privacy is a form of property as much as the right of immunity of one's person. Most of the leading cases are collected and discussed in this case. In the opinion the court quotes approvingly the following language from the dissenting opinion of Justice GRAY in *Roberson v. Rochester F. B. Co., supra:*

"The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to

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be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. Cooley, Torts, 29. The principle is fundamental and essential in organized society that every one, in exercising a personal right, and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the common law have no discussion upon the subject, are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection."

It will be seen, however, upon examination of the cases cited as sustaining the so-called right of privacy, that many of them turn upon property rights or breach of trust, contract, or confidence. *Levyeau v. Clements,* 175 Mass. 376, 56 N. E. 735; *Morison v. Moat,* 9 Hare, 241; *Prince Albert v. Strange,* 2 De G. & S. 652; *Tuck & Sons v. Priester,* L. R. 19 Q. B. D. 629; *Pollard v. Photographic Co.* L. R. 40 Ch. D. 345; *Gee v. Prichard,* 2 Swanst. 402; *Woolsey v. Judd,* 4 Duer, 379. See, also, 4 Harv. Law Rev. 193, and 3 N. W. Law Rev. 1; *Corliss v. E. W. Walker Co.* 57 Fed. 434, 64 Fed. 280.

2. We think the case before us does not turn upon the so-called "right of privacy," but upon contract relations. The plaintiff seeks to recover at law for the alleged value of the picture, upon the ground that he had a property right in it and that the defendant, by retaining it, became liable as a purchaser. The complaint is to recover for goods, wares, and merchandise sold and delivered to the defendant. The plaintiff, under a contract to paint the portrait, received the two photographs for the purpose of aiding him in the painting of

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the original picture, which he painted and was paid for in accordance with the contract. He then undertook, without any authority from the defendant, to paint the second portrait; and, as he says in his letter to defendant, "decided to risk having one painted, which I should be pleased to have you see, either at your home or mine, as it suits your convenience." There is no claim that plaintiff ever had authority to paint the second portrait or that defendant ever assented thereto. Under the contract plaintiff had no right to hold the photographs or use them for any other purpose than to aid him in painting the original picture. No express authority to use them for any other purpose was given, and none can be implied from the nature of the engagement. When the original picture was painted plaintiff's contract with defendant was performed, and he had no right to retain the photographs for any other purpose. When he undertook to produce another picture from the indoor photograph he violated his contract with defendant, and such act amounted to a breach of the trust reposed in him under the contract relation existing between them.

In *Levyeau v. Clements,* 175 Mass. 376, 56 N. E. 735, defendant contracted with plaintiff for a certain number of cuts from defendant's dies to be used by defendant in his business. The plaintiff, in addition to the number of cuts contracted for by defendant, printed a certain number extra for his own use without the knowledge of defendant. By mistake the extra cuts or folders were delivered, with the others, to defendant, which was immediately discovered, and demand made upon defendant for them, which was refused. Defendant kept the extra cuts not ordered, and used them the same as the others. In an action of trover the lower court ruled plaintiff could recover, and the judgment was reversed upon appeal. The court said (175 Mass. 379, 56 N. E. 736):

"The plaintiff had no right to use the dies to have impressions of them printed for his own use, and his use of them

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in having eighty extra copies of the folder struck off for himself, for the purpose of advertising his own business of making dies, was a breach of trust toward the defendant, which would have entitled the latter to have, at least if the matter were of sufficient consequence, an injunction to restrain the plaintiff from using the folders thus wrongfully obtained, and to a decree ordering them to be destroyed."

In *Tuck & Sons v. Priester,* L. R. 19 Q. B. D. 629, the plaintiffs employed defendant, who was a printer in Berlin, to make for them copies of a drawing. Defendant made the copies ordered, and also, without the knowledge or consent of plaintiffs, made other copies and imported them to England. It was held that there was an implied contract that defendant should not make any copies of the drawing other than those ordered by plaintiffs, and that plaintiffs were entitled to an injunction and damages by reason of the defendant's breach of contract. In *Pollard v. Photographic Co.* L. R. 40 Ch. D. 345, a photographer who had taken a negative likeness under agreement to supply the person with copies was restrained from selling or exhibiting copies, on the ground that there was an implied contract not to use the negative for such purpose; and, further, because such sale or exhibition was a breach of confidence. In *Prince Albert v. Strange,* 2 De G. & S. 652, it was held that, where a workman intrusted with copperplates for the purpose of taking impressions for the plaintiff of etchings made by the latter, and not intended for publication, took impressions for himself, in violation of the trust, and sold the impressions to the defendant, who published a catalogue of them, accompanied by remarks of his own, the plaintiff was entitled at the hearing to a perpetual injunction to restrain the publication of the catalogue and to a decree ordering the impressions to be destroyed.

We think the doctrine of the above cases rules the case before us, and that plaintiff had no right to paint the second picture or use the photographs for such purpose. The plaintiff, being guilty of a breach of contract and of trust and con-

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fidence as well in painting the second portrait, could acquire no property in it, and therefore had none to sell to defendant or any one else.

It follows that the plaintiff was not entitled to recover.

By the Court.—The judgment of the court below is affirmed.

DODGE, J. (*dissenting*). No rule is more elementary than that one who knowingly accepts and avails himself of services performed by another is bound by implied promise to pay for such services although neither requested nor authorized in advance. *Wheeler v. Hall,* 41 Wis. 447, 451; *Wellauer v. Fellows,* 48 Wis. 105, 4 N. W. 114; *Goodland v. Le Clair,* 78 Wis. 176, 47 N. W. 268; *Williams v. Williams,* 114 Wis. 79, 84, 89 N. W. 835; *Manitowoc S. B. Co. v. Manitowoc G. Co.* 120 Wis. 1, 8, 97 N. W. 515; *Indiana Mfg. Co. v. Hayes,* 155 Pa. St. 160, 26 Atl. 6; *Bartholomae & Co. v. Paull,* 18 W. Va. 771; *Ford v. Ward,* 26 Ark. 363; *Abbot v. Hermon,* 7 Me. 118. Here the plaintiff painted the picture in question knowing that defendant would not thereby be placed under any liability, but would have the right after its completion to avail himself of the service or reject it. At defendant's request it was placed in his possession to enable him to decide whether he would reject or would accept it, with complete understanding that plaintiff expected payment in the latter event. Defendant has retained it. He cannot now be heard to say that he did not expect to pay for it. His acts give him full benefit of plaintiff's work and he should not, by his own testimony to a mental state of disapproval, be permitted to deny the legal effect of such acts. He could have refused or surrendered the picture, if dissatisfied, with no prejudice to any so-called rights of privacy as they existed before plaintiff, at defendant's request, put it in the latter's possession.

The cases cited in the court's opinion (*Levyeau v. Clements, Tuck & Sons v. Priester, Pollard v. Photographic Co.,*

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and *Prince Albert v. Strange*) clearly have no relevancy. In them the plaintiff was attempting to acquire advantage to himself in breach of the understanding under which he had acquired an opportunity to do so. His motive was bad; approximately fraudulent. Here, on the contrary, plaintiff was attempting to confer a benefit upon defendant; in good faith believing that the latter's desire for a picture of his deceased wife would be best satisfied by the service rendered and tendered for acceptance or rejection by the latter. I think plaintiff is entitled upon the facts to recover the reasonable value of the benefit conferred on defendant, and therefore must dissent from the court's decision.

I fear that the marked prominence given to quotation from a dissenting opinion in *Roberson v. Rochester F. B. Co.* 171 N. Y. 538, 64 N. E. 442, may suggest approval of the views quoted as to existence of any legal right of privacy. I certainly am not prepared to yield concurrence therewith, nor did I understand that the court in any degree adopted them, but, on the contrary, decided to express no opinion on that important and vexed subject.

KAUFER, Appellant, vs. STUMPF and wife, imp., Respondents.

October 9—November 7, 1906.

Statute of frauds: Pleading: Oral promise to pay debt of another: Contracts relating to land: Judgment: Costs: Harmless irregularity.

1. Where a complaint alleged that defendant agreed to indorse a note of J. S. and agreed to pay it in consideration of a transfer of land to J. S., defendant may, without pleading it, rely upon the statute of frauds (sec. 2307, Stats. 1898) declaring void an oral promise to answer for the debt of another.

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2. A promise in form to guarantee payment of the debt of another, but in fact to pay the promisor's own debt, is not within the statute.
3. An oral agreement between the parties that plaintiff should advance moneys to buy land at a foreclosure sale, take the title in his own name, and transfer it to defendant upon the latter reimbursing him, and that defendant should reimburse him for the advances, such agreement being executed by plaintiff to the extent of purchasing at the sale, was within the statute of frauds (sec. 2302, Stats. 1898) and void.
4. Defendant's oral promise in such case to repay plaintiff's advances being void, his subsequent oral promise, in consideration of a transfer of the land to his brother, to indorse his brother's note for said advances and to pay such note, was not a promise to pay his own debt, but a collateral promise to pay the debt of another, and hence void under sec. 2307, Stats. 1898.
5. Entry of judgment for costs in favor of a defendant who had been served with notice that no personal claim was made against her, was a harmless irregularity where the costs taxed were no greater than they would have been had the judgment been in favor of her husband only, in whose answer she had joined.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to foreclose a mortgage and to obtain a judgment against *Charles J. Stumpf* as one personally liable for the mortgage indebtedness, as well as against John Stumpf, Jr., maker of the note mentioned in the mortgage.

The complaint contained all the usual allegations for the foreclosure of a mortgage as to the defendant John Stumpf, Jr. The note was for $3,500, payable two years after date with interest at the rate of six per cent. per annum, payable according to the tenor and effect of coupons attached thereto, which provided for interest at the rate of seven per cent. per annum after due. There were appropriate allegations showing the due execution of the mortgage, the conditions thereof, the recording of the same, and default in the performance of such conditions creating the cause of action for foreclosure. There were also allegations as grounds for the alleged liabil-

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ity of *Charles J. Stumpf,* in effect as follows: On or about May 29, 1899, at a sheriff's sale to enforce a judgment of foreclosure of a mortgage wherein *Charles J. Stumpf* was adjudged to be personally liable for the mortgage indebtedness, the property involved was bid in by the plaintiff, acting through an agent, in his own name for said *Charles J. Stumpf* for $3,400, pursuant to an agreement between them that the sheriff's deed should run to the plaintiff, and upon the sale being confirmed that he should deed the property to said *Stumpf* and receive from him reimbursement for all money advanced in so securing the property. The total sum so advanced was $3,500. Subsequent to the sale it was duly confirmed, and thereafter on or about June 13, 1899, said *Charles J. Stumpf* informed plaintiff that he was unable at once to pay back the advances, but could and would secure the same by a mortgage on the premises; that he would have the title to the property vested in his brother John Stumpf, Jr., and then have the latter give a note for $3,500 and a mortgage on the property to secure the payment thereof, and that he, the said *Charles J. Stumpf,* would indorse said note and would pay the indebtedness with interest as provided in said note. Plaintiff accepted the proposition of said *Charles J. Stumpf,* deeded the property to said John Stumpf, Jr., delivered the deed to *Charles,* and received from him the note of John Stumpf, Jr., and the mortgage on the property in suit.

The defendant *Charles J. Stumpf* answered, among other things, admitting that plaintiff purchased the property involved under the circumstances stated in the complaint, and alleging that it was agreed that plaintiff should convey the property to said *Charles J. Stumpf* or such person as should be mutually agreed upon, and that he should pay plaintiff such sum over and above $3,500 as might be necessary to make up the difference between the latter sum and the amount due under the judgment of foreclosure, and as security for

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the said $3,500 a mortgage should be given by the person so receiving the conveyance of the premises; that pursuant thereto $638 was paid plaintiff and he conveyed the property to John Stumpf, Jr., who executed the note and mortgage in suit and delivered the same to plaintiff. The answer contained a specific denial that *Charles J. Stumpf* agreed to pay the note.

As a defense sec. 2302, Stats. 1898, was invoked upon the ground that the agreement between plaintiff and *Charles J. Stumpf* was merely verbal.

No issue was taken on any of the allegations of the complaint as to the cause of action against John Stumpf, Jr.

The court found all the facts requisite to a judgment of foreclosure as to John Stumpf, Jr., and found that there was justly due plaintiff upon the note and mortgage covering the indebtedness of *Charles J. Stumpf,* for which the note and mortgage were given, $5,038.62. The court further found, as regards the liability of *Charles J. Stumpf,* that he merely promised orally to guarantee the payment of the note and mortgage and that such promise was void under the statute of frauds.

The court further found, as to the liability of *Charles J. Stumpf:* Plaintiff purchased the mortgaged property for *Charles J. Stumpf* at a foreclosure sale, as alleged in the complaint, under an agreement that the sheriff's deed should run to the plaintiff and that upon its being confirmed *Charles J. Stumpf* should reimburse plaintiff for all moneys advanced by him in the matter. To complete the purchase plaintiff advanced $3,400, took the sheriff's deed, and the same was thereafter confirmed. Plaintiff also advanced for said *Charles J. Stumpf,* at his request, a further sum of $100 towards discharging the deficiency of $738.44 due on the foreclosure judgment, for which said *Charles J. Stumpf* was liable. Thereafter, having in view the carrying out of the aforesaid agreement, said *Charles J. Stumpf,* representing that he was

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unable at once to pay back the said sum of $3,500, said to plaintiff's agent that he would secure the same by a mortgage on the premises; that to avoid injuring his financial standing he would have the title to the property transferred to his brother John Stumpf, Jr., and have him give the mortgage to plaintiff to secure said sum of $3,500, and that he would guarantee the payment of his brother's note. On June 13, 1899, $638.44, the balance of the deficiency on the foreclosure judgment, was paid by said *Charles Stumpf*. Relying upon such representations and promises plaintiff deeded the property in question to said John Stumpf, Jr., and received from him, at the same time, the note and mortgage in suit. Such note and mortgage were given to secure the $3,500 and interest due to plaintiff from said *Charles J. Stumpf* at the time the note and mortgage were given.

Upon such decision and findings the court concluded that *Charles J. Stumpf* was not liable for the mortgage indebtedness and that he and his wife *Agnes*, who was made a defendant, were entitled to judgment against plaintiff dismissing the complaint as to them, with costs. Judgment, in due form, for a foreclosure sale was rendered as to John Stumpf, Jr., and as to *Charles J. Stumpf* and wife in accordance with the foregoing. From such judgment dismissing the cause with costs as to *Charles J. Stumpf* this appeal was taken.

For the appellant there were briefs by *Nath. Pereles & Sons*, and oral argument by *C. S. Carter* and *W. H. Churchill*. To the point that, even if the agreement of *Charles J. Stumpf* to guarantee payment of his brother's note were within sec. 2307, Stats. 1898, the defense of the statute of frauds, to be available, must be pleaded, they cited *Matthews v. Matthews*, 154 N. Y. 288; *Crane v. Powell*, 139 N. Y. 379; *Sanger v. French*, 157 N. Y. 213; *Hamill v. Hall*, 4 Colo. App. 290; *Chicago & W. C. Co. v. Liddell*, 69 Ill. 639; *Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498; *Citty v.*

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Manufacturing Co. 93 Tenn. 276, 42 Am. St. R. 919; 9 Ency. Pl. & Pr. 705, 716, and cases there cited.

For the respondents there was a brief by *McElroy, Eschweiler & Wetzler,* and oral argument by *F. C. Eschweiler.*

MARSHALL, J. At the outset on this appeal stands the contention of appellant that respondent waived the statute of frauds (sec. 2307, Stats. 1898), relating to the validity of any agreement to answer for the debt, default, or miscarriage of another, by not pleading it, and, therefore, that the court erred in applying such statute to the guaranty found to have been made by respondent and upon which his liability rests, if he is liable at all.

As no contract of guaranty, valid or invalid, was set forth in the complaint respondent was in no position to plead the statute on that subject as a defense. The claim set forth in the complaint was that respondent agreed to indorse John Stumpf's note and agreed to pay it in consideration of the transfer of the land to John. That was put in issue and the finding was substantially in respondent's favor. There is much authority to the effect that when the contract pleaded is put in issue the plaintiff in order to recover must establish a valid agreement. The defendant is not called upon to anticipate that an invalid contract will be established and to plead thereto. *Taylor v. Merrill,* 55 Ill. 52; *Hunter v. Randall,* 62 Me. 423; *Russell v. W., M. & P. R. Co.* 39 Minn. 145, 39 N. W. 302; *Bernhardt v. Walls,* 29 Mo. App. 206; *Allen v. Richard,* 83 Mo. 55, 60.

The principal contention relied on, as it seems, is that the court erred in deciding that the agreement made by *Charles Stumpf* to guarantee the payment of John Stumpf's note was a purely collateral promise and so void under sec. 2307, Stats. 1898, before referred to. It is insisted by appellant's counsel that the promise was original in character in that it

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was to pay the promisor's own debt to appellant. This court has often held, as claimed by counsel, that a promise, in form, by one person to guarantee payment of the debt of another, where such promise is in fact to pay such person's own debt, is not within the statute because not collateral. *Dyer v. Gibson,* 16 Wis. 557; *Wyman v. Goodrich,* 26 Wis. 21; *Putney v. Farnham,* 27 Wis. 187; *Young v. French,* 35 Wis. 111; *Hoile v. Bailey,* 58 Wis. 434, 17 N. W. 322; *McCord v. Edward Hines L. Co.* 124 Wis. 509, 102 N. W. 334. In order that such doctrine could be applied here, it would be necessary for it to appear that at the time *Charles Stumpf* made the agreement to guarantee his brother's note he was indebted to appellant and that the agreement was in reality to pay such indebtedness.

Whether an indebtedness existed as above suggested depends upon the facts found by the court, not upon mere language contained in the findings referring to the relations between appellant and respondent *Charles Stumpf* as those of debtor and creditor. It seems that the court did not mean in using such language that a valid indebtedness existed between the parties, because that would be plainly inconsistent with the decision that the guaranty was a mere collateral promise. True, with considerable significance the court mentioned such relations as those of debtor and creditor. It was said in the findings that the note and mortgage made by John Stumpf, Jr., were delivered to appellant to secure *Charles Stumpf's* indebtedness, and further, that when *Charles Stumpf* suggested to appellant the deeding of the property to John he said he would secure his indebtedness to appellant by a note and mortgage on the property given by John and that he would guarantee such note. We do not deem the use of such language by any means conclusive that the trial court held that there was a valid indebtedness of *Charles Stumpf* to appellant, and if it were otherwise such holding would be in the nature of a conclusion of law and not stand in the way

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of the real relations between the parties as shown by the facts found.

Now at the time the arrangement was made between appellant and *Charles Stumpf* as to the property acquired by the former being deeded over to John Stumpf, there existed, according to the findings, merely an agreement that appellant should advance the necessary money to buy in the property at the foreclosure sale, take the title in his own name, and transfer it to *Charles* thereafter upon the latter's reimbursing him for such advances, such agreement being carried out to the extent of acquiring the property at such sale and making such advances. We are unable to see why at that stage the agreement was not within the statute of frauds (sec. 2302, Stats. 1898), requiring agreements relating to real estate to be in writing, which was pleaded. It seems to fall clearly within the principle of *Scheuer v. Cochem,* 126 Wis. 209, 105 N. W. 573, where it was held, as indicated by the syllabus:

"An oral agreement by which the parties were to become jointly interested, as partners, in the purchase of land—one to advance the whole purchase price and take the title in his own name and afterwards, on repayment to him of one half the sum so advanced, with interest, to convey an undivided half to the other party, is within the statute of frauds (sec. 2302, Stats. 1898); and it is immaterial whether the party so orally agreeing to convey was the owner of the land at the time or whether he afterwards acquired the title."

The basic idea of the decision is that so long as the obligation to convey the land rests in a mere oral agreement it is void.

It seems to follow necessarily that when *Charles Stumpf* agreed to guarantee his brother's note there was no binding agreement existing between him and appellant to take the land and repay the advances. There existed a mere void promise in that regard. It would seem to logically follow that the agreement as to the note was collateral, as the court found, and within sec. 2307 of the statute of frauds (Stats.

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1898). While it does not clearly appear that the learned circuit judge thus reached a conclusion we apprehend that he did, and, in any event, it seems that such conclusion is the necessary result of the facts found and the law as laid down in the decisions of this court.

Error is claimed because the court allowed judgment to go in favor of respondent *Agnes G. Stumpf* for costs although no personal claim was made against her, she being joined as a defendant, as the wife of *Charles Stumpf*. At the worst that was a mere harmless irregularity. The two defendants joined in answering the complaint. They appeared by the same attorneys. So far as we can discover the costs were no greater than they would have been had judgment been rendered therefor in favor of *Charles Stumpf* only.

By the Court.—Judgment affirmed.

STEFANOWSKI, by guardian *ad litem*, Appellant, vs. CHAIN BELT COMPANY, Respondent.

October 9—November 7, 1906.

Master and servant: Negligence: Defective machinery: Injury to servant from use of his own device: Proximate cause.

Defects in the drilling machinery with which plaintiff was reaming out holes in links for chain belts caused the links to become heated and made it necessary for him to adjust them with his fingers. He complained thereof, but was directed to go back to his work or quit. He accordingly returned to the work, but constructed a device of his own invention, consisting of a wire hook hung by a loop around two of his fingers, with which to pull the links from the machine. There was no likelihood or danger of his fingers being brought in contact with the drill if he operated it in any manner within the previous knowledge or experience of any person; but the wire hook attached to his fingers was caught and wound around the drill shaft and the

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fingers were pulled off. *Held*, that the use of such device was the efficient cause of the injury; that such use was neither probable nor within reasonable anticipation; and hence that the defects in the machine were not proximately connected with the injury so as to make them the legal cause thereof.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Plaintiff, when thirteen and one-half years of age, was employed in the factory of the defendant, which was engaged in making chain belts composed of U-shaped links joining the jaws of one to the base of another by a transverse bolt running through holes in the jaws of the one link and the straight base of the other. These links were about two inches long and two inches wide. They were roughly cast, with a transverse hole through each of the jaws and through the straight base, and plaintiff was set to work with a drill at reaming out these holes. The machine had a table on which the link was placed, and from above descended a vertical revolving shaft having at the lower end a sharpened drill, rapidly revolving, which penetrated these holes and smoothed them. Upon the table was a jig or bar of iron calculated to just fit within the jaws of the link and to hold it rigid so that the descending drill would exactly strike and penetrate the holes. The drill was caused to descend by pulling upon a lever with the left hand of the operator. The link was placed upon the jig with the right hand of the operator, who, under most circumstances, was also required to squirt, from an ordinary oil can, water upon the drill to keep it from heating. Plaintiff's testimony tends to show that the jig on the machine in question had become somewhat worn so that it did not hold the link in perfect position, but needed the aid of his hands; also that the water can worked badly so that the process of drilling made the link too hot to be comfortably touched with bare fingers; also it is claimed that the drill supplied him had been worn so short that it would not reach the hole in the lower

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jaw of the link when in position, so that after drilling a hole in one jaw the link had to be withdrawn, turned over, and again pushed onto the jig in order to bore the hole in the other jaw. Plaintiff's fingers became sore from repeated contact with the hot links. He complained of the situation and of this trouble and asked to be put at other work, but was commanded to go back to this work or go home. He accordingly returned to the work, and at noon constructed a device of his own invention, consisting of a small wire one end of which he bent at right angles to constitute a hook to insert in the hole through the base of the link to pull it away from the machine. At the other end he bent the wire into a loop to fit round the two middle fingers so as to hang there during other operations with the right hand, thus avoiding delay of laying the hook down and picking it up each time. This wire, as it was attached to the fingers, was necessarily brought into close proximity to the vertical revolving drill in each operation of turning over the link and reinserting it on the jig. After about a half hour's use it caught thereon, and the wire was rapidly wound around the drill shaft, and plaintiff's two middle fingers pulled off.

After trial and overruling motions for nonsuit and for direction of a verdict in favor of the defendant, the jury found a special verdict to the effect that plaintiff was not sufficiently instructed of danger, and had not sufficient knowledge to comprehend the risk of the wire hook used by him, and was not guilty of any want of ordinary care; that the drill press was defective and defendant charged with knowledge thereof; and, in answer to the seventh question, that the insufficient condition of the drill press was the proximate cause of the plaintiff's injury. Plaintiff's motion for judgment was denied, and defendant's motion to reverse the answer to the seventh question was granted, and judgment rendered in favor of the defendant, from which plaintiff appeals.

For the appellant there was a brief by *Loyal H. McCarthy*

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and *Charles G. Woolcock,* attorneys, and *W. S. Frazier,* of counsel, and oral argument by *Mr. Woolcock.* To the point that the defective condition of the machine was the proximate cause of the injury, they cited *Coolidge v. Hallauer,* 126 Wis. 244; *Winchel v. Goodyear,* 126 Wis. 271, 276; *Darcey v. Farmers' L. Co.* 87 Wis. 245; *Shepherd v. Morton-Edgar L. Co.* 115 Wis. 522; *Yess v. Chicago B. Co.* 124 Wis. 406; *Cleveland R. M. Co. v. Corrigan* (Ohio) 3 L. R. A. 385, 390; *Siegel, Cooper & Co. v. Trcka,* 218 Ill. 559, 2 L. R. A. N. S. 647; *Block v. Milwaukee St. R. Co.* 89 Wis. 371.

For the respondent there was a brief by *Roemer & Aarons,* and oral argument by *J. H. Roemer.*

DODGE, J. The sole error assigned is that the court held, as matter of law, that the defective condition of the drill was not the proximate cause of plaintiff's injury, against which holding appellant's counsel presents a forcible and plausible argument. While every act or event without which some result would not have been reached is, in colloquial sense, a cause thereof, not every such act or event is the legal cause of the injurious result in the law of torts. That legal proximate cause which, when it involves negligence of another, results in his liability has been often defined and last carefully discussed in the two opinions in *Winchel v. Goodyear,* 126 Wis. 271, 105 N. W. 824. The proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have reasonable ground to expect at the moment of his act or default that an injury to some person might probably result

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therefrom. The act of one creating a peril may none the less be the legal cause of an injury to another because of intervening events which might or might not take place, provided such events are natural and probable, and provided the probability of injury might be reasonably anticipated. In both the *Winchel v. Goodyear* and *Yess v. Chicago B. Co.* (124 Wis. 406, 102 N. W. 932) cases the intervening event was a slipping of the person injured by reason of surrounding conditions, thus bringing himself within the peril which the defendant had created, and it was held that such events might, by a jury, be considered natural and probable under all the circumstances. A similar holding was made in *Morey v. Lake Superior T. & T. Co.* 125 Wis. 148, 103 N. W. 271, where the intervening event was a fainting or falling of the injured person caused by fright at the sudden apparition of an unnotified and negligently rapid railroad train. In the last-cited case, at page 155 (103 N. W. 273), was adopted a carefully framed description of such an intervening event as will break the chain of legal proximity between an earlier negligent act and the injury:

"Whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequences would not have happened, then such injurious consequences must be deemed too remote to constitute the basis of a cause of action."

The question here presented is whether the use by plaintiff of the wire hook could, by any reasonable mind, be deemed such a natural and probable event so that a chain of legal causation between the defective condition of defendant's drill and the injury to plaintiff's fingers was unbroken. Of course we are not advanced much toward an answer to this inquiry by the obvious fact that, but for the use of such wire, the injury would not have happened. It is equally true that

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but for the fainting or slipping in the cases just mentioned the injury would not have occurred; and yet it is doubtless essential to a holding that the use of the wire, instead of being one of a chain of natural and probable events, was in fact the legal cause of the injury, that we should discover that the injury would not have happened without it; therefore it is proper to mention that entirely obvious fact. Another fact which is of some cogency, though not in all cases conclusive, is that there was no close causal connection between the defective drill and the use of the wire invented by the plaintiff and used upon his own volition. But causation of every act, circumstance, or condition which participates in the chain of events leading to the injurious result need not be by the event or act which is held the proximate cause, for in both the *Yess* and *Winchel Cases* the slipping of the plaintiff was in no wise caused by the defect in the machine from which he suffered. Their efficacy was merely to bring about a condition subjecting plaintiff to the perils negligently created by the defendants in the respective cases, acting naturally and probably. It does, however, appear in the present case that in the operation of the drill in question there was no likelihood or danger of plaintiff's fingers being brought in contact therewith if he operated it in any manner within the knowledge or experience of any person; that the only way in which his fingers were in fact brought into that peril was by reason of the use of a device unique and unprecedented, and which cannot but be considered the result of very unusual ingenuity and invention by the plaintiff himself. So far as appears by the evidence, no one had ever thought of using a hook for pulling the links away from the machine; but that is not all of the peculiarity involved in plaintiff's device. A mere hook which was to be laid down pending the other operations with the right hand, and picked up again when used, would not have brought about the injury, but it would have been inconsistent with the rapidity with which the operations of the insertion,

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turning, and removal of the links needed to be performed. To obviate this latter difficulty plaintiff's invention went to the extent of devising a loop on one end to place over his fingers in such a position that the hook end would be out of the way while he was manipulating the links with his fingers, and yet not involve the delay of laying it down and picking it up again. But it was this very circumstance of the arrangement of the wire with this loop, so that in a certain position of his hand it was brought into close proximity to the vertical shaft of the drill, that enabled it to come in contact with that revolving shaft and thus tear away his fingers. Obviously here was such novelty of invention as would almost, if not quite, satisfy the most hypercritical patent examiner. Surely it cannot be that an event which never occurred before in years of human experience, and which could not happen without what amounts to a spasm of inventive genius in an inexperienced boy, is either probable or within reasonable anticipation. The contrast presented by *Coolidge v. Hallauer,* 126 Wis. 244, 105 N. W. 568, is instructive. There, the intervening act or event which immediately rendered the defect in a lathe efficient to injure, was the application of a file by the injured man, but that act was one known by the employer to be customary and frequent with operatives, and the file had been provided for that purpose. Further interestingly instructive cases have been gathered by respondent's counsel. *Nelson v. Narragansett E. L. Co.* 26 R. I. 258, 58 Atl. 802; *Stephenson v. Corder,* 71 Kan. 475, 80 Pac. 938; *Fishburn v. B. & N. W. R. Co.* 127 Iowa, 483, 103 N. W. 481; *Conley v. Am. Exp. Co.* 87 Me. 352, 32 Atl. 965; *Pryor v. L. & N. R. Co.* 90 Ala. 32, 8 South. 55; *E. T., V. & G. R. Co. v. Reynolds,* 93 Ga. 570, 20 S. E. 70; *McFarlane v. Sullivan,* 99 Wis. 361, 74 N. W. 559, 75 N. W. 71; *Holdridge v. Mendenhall,* 108 Wis. 1, 5, 83 N. W. 1109.

We conclude that the trial court correctly decided that the evidence conclusively established that the act of the plaintiff

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in using the wire device was the efficient cause of the injury, and that it was neither probable nor within reasonable anticipation of an ordinarily prudent and intelligent person, and, as a result, that the defects in the drill were not proximately connected with the injury so as to make them the legal cause thereof.

By the Court.—Judgment affirmed.

BECKER, Respondent, vs. BLUEMEL, imp., Appellant.

October 9—November 7, 1906.

Mortgages: Power of agent for collection: Payment: Discharge: Taking new mortgage: Assignment: Consideration: Colorable book entries: Estoppel.

1. An agent for the collection of a note and mortgage cannot, unless specially authorized, take anything except money in payment.
2. A note and recorded mortgage for $850, given to one K., were assigned, but the assignment was not recorded. The assignee placed them in the hands of an agent for collection, who thereafter accepted as payment thereof a new note and mortgage running to K. for the same amount from grantees of the original mortgagor. The old securities were surrendered, a satisfaction being executed by the agent as attorney in fact for K., but not recorded. The agent had theretofore collected $800 for the defendant J. B., and had been authorized to reloan it. Upon payment of an additional $50 by J. B. the new note and mortgage were assigned to her. The agent did not then have the $800 collected for J. B. and was in fact insolvent. No moneys other than said $50 were in fact received or paid by the agent on account of the transaction, but colorable entries were made on his books crediting the holder of the original note and mortgage with $850, as proceeds of the new note and mortgage, and to the effect that $850 of the money of J. B. had been paid to the new mortgagors and a like sum collected from them in payment of the original note and mortgage. There was no proof that J. B. had been informed that the original mortgage had been discharged. *Held*, that the original note and mort-

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gage had not been paid, but were valid, subsisting securities; that the holder thereof was not estopped to assert his rights thereunder as against J. B.; and that the new note and mortgage were void in the hands of J. B., there having been no consideration for them or for their assignment to her.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to foreclose a real-estate mortgage. On May 10, 1900, Herman J. Lindenmann gave a mortgage on real estate he then owned to secure his note for $850, payable to the order of Mary Kurth. C. W. Milbrath, as her attorney in fact, under power of attorney giving authority to make an assignment of this note and mortgage, transferred them by written agreement to Elizabeth Becker, plaintiff's wife. This assignment has not been recorded, and is either lost or destroyed. On August 21, 1905, Elizabeth Becker transferred this note and mortgage by written assignment to the plaintiff. This assignment is unrecorded. After the giving of this mortgage Lindenmann conveyed the premises, subject to the mortgage, to Charles Elsner, who on June 21, 1900, conveyed them by warranty deed to the defendants Haase and Grube, the grantees assuming payment of the debt secured by this mortgage on the land. The note matured May 10, 1905. On May 19, 1905, plaintiff, as agent of his wife, Elizabeth Becker, delivered this note and mortgage to the C. W. Milbrath Company for collection. The Milbrath Company had acted as collecting agents for her of like secured claims, and, whenever so directed, reloaned the proceeds and gave releases to the paying debtors.

In the month of March, 1905, the Milbrath Company received $800 for the defendant *Johanna Bluemel.* This was paid to it on a note and mortgage then due and owned by her and in the hands of the Milbrath Company for collection. Under an agreement with her the company was authorized to reloan the money on real estate for her. The Milbrath Com-

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pany entered the receipt of this money in their books of account in the name of *Johanna Bluemel* under "Bills Payable," and as received from the mortgagor of the loan. *Johanna Bluemel* never received this money, or any part thereof, from the Milbrath Company.

About May 25, 1905, Herman J. Lindenmann, the maker of the note and mortgage now sought to be enforced by plaintiff, agreed with the Milbrath Company, for himself and the defendants Haase and Grube, the present owners of the land covered by plaintiff's mortgage, that the present owners should execute a new note for $850 and a new mortgage on the same lands securing its payment, and that such note and mortgage should be received by the Milbrath Company as payment of the plaintiff's note and mortgage. Pursuant to such agreement, on May 25, 1905, Haase and Grube made a note for $850 payable after five years to Mary Kurth, and gave a mortgage on the same premises to Mary Kurth to secure its payment. This note and mortgage they delivered to Herman J. Lindenmann. He delivered them to the Milbrath Company under the arrangement with its officers that such note and mortgage should be received by them in payment of plaintiff's note and mortgage, which they then held for collection as agents of plaintiff's wife, Elizabeth Becker. Upon receipt from Lindenmann by the Milbrath Company of the Haase and Grube note and mortgage, the Milbrath Company, as attorney in fact for Mary Kurth, on May 25, 1905, executed a satisfaction of the note and mortgage now sued on by plaintiff and delivered the note and mortgage to Lindenmann, who ever since has kept them and the satisfaction piece in his possession without placing the satisfaction on record.

The Milbrath Company, at the time of the transaction, had an account upon its ledger in the name of Elizabeth Becker, and therein credited her with $850 as the proceeds of the Haase and Grube note and mortgage, debited their "loan ac-

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count" on the books with a like sum, specifying that it pertained to a loan of *"Johanna Bluemel,"* and made other book entries to the effect that they had paid $850 of the money of *Johanna Bluemel* to Haase and Grube, and that they had collected from Haase and Grube a like sum in payment of plaintiff's note and mortgage. No money was in fact received or paid by the Milbrath Company on account of this transaction, except the sum of $50 paid to it by *Johanna Bluemel,* and these entries were in fact, except as to the $50, mere colorable book entries. At the time of these transactions, on or about May 25, 1905, the Milbrath Company did not have the $800 collected by them in March, 1905, for *Johanna Bluemel,* and it was in fact insolvent. It was owing to its clients, who had given it money to invest, an amount exceeding $5,000. The cash it had at this time was deposited to the personal account of C. W. Milbrath, an officer of the company, and was somewhere between $200 and $300 in amount. The company's financial condition did not improve up to the time it went into bankruptcy on the following August 18, 1905.

The note and mortgage for $850, given by Haase and Grube on May 25, 1905, and delivered to the Milbrath Company by Lindenmann in the manner above related, were assigned by the company, in the name of C. W. Milbrath as attorney in fact for Mary Kurth, to *Johanna Bluemel,* and an instrument of assignment, together with such note and mortgage, was delivered to her, and such assignment was duly recorded August 19, 1905. The transfer of the Haase and Grube note and mortgage was conducted by the officers of the Milbrath Company for *Johanna Bluemel.* None of the defendants had actual knowledge of the rights of Elizabeth Becker or of the assignment of the note and mortgage sued on. Elizabeth Becker and the plaintiff had no knowledge of the transactions respecting the execution, delivery, and assignment of the note and mortgage of Haase and Grube given

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May 25, 1905, nor of the satisfaction and delivery to Lindenmann of the note and mortgage sued on.

The court found that the plaintiff's note and mortgage had never been paid or discharged, and that notice of *lis pendens* was duly filed at the commencement of the action August 23, 1905, and decreed that the full amount of the principal and interest due on the note be recovered by the plaintiff, that foreclosure of all the right, title, and interest of the defendants in and to the lands be had, that Herman J. Lindenmann deliver the note and mortgage to the clerk of the court for the use of the plaintiff and *Johanna Bluemel,* that the satisfaction of them as executed by C. W. Milbrath, as attorney in fact for Mary Kurth, be canceled and held for naught, and the Haase and Grube note and mortgage, now held by *Johanna Bluemel,* to be without consideration and void, and that they should be canceled. From this judgment *Johanna Bluemel* appeals.

Edgar L. Wood, for the appellant.

For the respondent there was a brief by *Turner, Hunter, Pease & Turner,* and oral argument by *C. F. Hunter.*

SIEBECKER, J. The appellant assails the finding of the court to the effect that the plaintiff's note and mortgage were not paid by the acceptance of the new note and mortgage given by Haase and Grube and delivered to the Milbrath Company. It is beyond question that the Milbrath Company, as plaintiff's agent for the collection of the note and mortgage, was restricted to receiving payment of them in money. They had no authority to receive payment in any other way. The claim that the course of dealing between them and Elizabeth Becker, before they undertook the collection of this note, shows that they had full power to deal with defendant's note and mortgage as owners, is not sustained. It is apparent that their authority to deal with these securities was limited to that of collection agents, under which they could receive

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payment of them only in money. We must then ascertain whether the finding that nothing was in fact paid to them as such agents, except the sum of $50 paid by appellant on May 25, 1905, is sustained by the evidence.

The contention is that the Milbrath Company had collected $800 in money for appellant in the month of March and held it for her to reloan it, and that the books of accounts show that they, as agents of *Mrs. Bluemel,* applied this sum and the $50 delivered to them by her to the payment of plaintiff's note. While the book entries which are relied on tend to show such a transaction, yet the facts established by the other evidence in the case are that the Milbrath Company, at the time of surrendering plaintiff's note and mortgage to Lindenmann on May 25, 1905, accepted the Haase and Grube note and mortgage as payment of them, and that the officers of this company did not at any time thereafter pay the $800 of appellant's money in consideration of transferring the Haase and Grube securities to her. The Milbrath Company did not have on hand the $800 which they had collected for appellant in the preceding March, and they could not, therefore, at the time of the alleged payment of plaintiff's note and mortgage, apply this money in payment of them as claimed upon their books of accounts. Under the facts and circumstances these are mere colorable entries and amount to a bookkeeping transfer of appellant's credit to Elizabeth Becker. This, of course, did not operate as a payment of plaintiff's note and mortgage. The court's conclusion that the Milbrath Company was insolvent at the time of these transactions is fully warranted by the evidence. Large sums intrusted to the company to be loaned for its clients had been converted by the officers to the use of the company, and it was unable to pay them, and soon thereafter was forced into bankruptcy. The plaintiff's mortgage was recorded long before appellant's mortgage was made and recorded, and remained unsatisfied of record up to the time this action was commenced. There is no proof show-

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ing that appellant had been informed that this mortgage was discharged. Her agents, the officers of the Milbrath Company, had actual notice that it was a subsisting mortgage and had not in fact been paid at the time they assigned the Haase and Grube securities to her. It is obvious from these facts that plaintiff is entitled to insist upon his mortgage security and to enforce it in this action.

Exception is urged to the point, found by the court, that the assignment of the Haase and Grube mortgage to appellant was without consideration and therefore void. From the foregoing facts it is clear that the assignment was based on the transaction through which they sought to effect payment of plaintiff's note by the application of appellant's credit for the $800 of her money they had collected. Since the accomplishment of that object failed for the reasons above stated, it must necessarily follow that Haase and Grube received no consideration for the note and mortgage they made in favor of Mary Kurth and which they delivered to Lindenmann in payment of the note and mortgage in question. Nor was there consideration for its subsequent assignment by the Milbrath Company to appellant. Upon these facts the court declared the note and mortgage void in appellant's hands.

It is urged that the doctrine of estoppel as applied in *Marling v. Nommensen,* 127 Wis. 363, 106 N. W. 844, and the other cases cited, has application to the plaintiff in the instant case. We discover no similarity in the facts of this case to the facts and circumstances there presented, and hence no basis for the application of the rule. There is no reversible error in the case.

By the Court.—Judgment affirmed.

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ZAHORKA and others, Appellants, vs. GEITH, Respondent.

October 10—November 7, 1906.

(1) *Appeal to supreme court: Notice, how directed and served.* (2) *Appeal from county court: Undertaking.* (3–5) *Divorce: Jurisdiction: Proof of service by publication: Order for publication within reasonable time after affidavit: Neglect to enter judgment after order therefor: Subsequent judgment* nunc pro tunc.

1. The notice of an appeal to the supreme court, under sec. 3049, Stats. 1898, need not be in form directed to the clerk of the circuit court; and the filing of such notice with said clerk is a sufficient service upon him.
2. On appeal from a county court to the circuit court, an undertaking conforming strictly to sec. 4032, Stats. 1898, and approved as to form, amount, and sufficiency of sureties by the county court, was sufficient to give the circuit court jurisdiction, although it did not run "to the judge of the county court" for the security and benefit of all persons interested, under sec. 4013.
3. In an action for divorce, where the mailing of copies of the summons and complaint to defendant had been ordered, the mere fact that an affidavit showing such mailing was not on file did not deprive the court of jurisdiction to order judgment of divorce, where copies had in fact been mailed as ordered and an affidavit showing that fact was subsequently filed.
4. An order for service by publication, under sec. 2640, Stats. 1898, made four days after the making of the affidavit therefor and three days after a return of the sheriff that defendant could not be found, is *held* to have followed such affidavit "within a reasonable time" and to be valid.
5. Where, at the close of the trial of an action for divorce, judgment was "ordered for plaintiff and against defendant," and nothing further was to be done except for the clerk to enter judgment in obedience to such direction, but the clerk failed to perform such duty, a judgment of divorce ordered and entered fourteen years later, *nunc pro tunc* as of the date of said first order for judgment, was binding and effectual in dissolving the marriage as of said date.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Lenicheck, Fairchild & Boesel,* and oral argument by *F. T. Boesel.*

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For the respondent the cause was submitted on the brief of *Nohl, Nohl, Poss & Mangan.*

CASSODAY, C. J. In the matter of admitting to probate the last will and testament of one Carl Geith, deceased, the question arose whether the defendant was the wife of the testator at the time of his death, and hence whether she was entitled to the rights given to her as widow by the statute. The county court on February 7, 1905, found as matters of fact that at the time of the testator's death the defendant was his wife, and thereupon adjudged that as his widow she was interested in the matter and a statutory heir at law of said deceased; and the same was thereby declared to be fully and finally established in said matter. Thereupon the legatees and devisees named in said will and heirs at law of said deceased appealed from such judgment of the county court to the circuit court, whereupon the question whether the defendant was the wife of the testator was retried in the circuit court, and at the close of the trial, and on December 8, 1905, that court found as matters of fact, in effect, that at the time of the testator's death the defendant was his wife, and as his widow was and is an interested party in the probate of such will, and that the case involves the determination as to whether the defendant is the statutory heir of said deceased. As conclusions of law the circuit court found that the defendant was the lawful widow and a statutory heir at law of said deceased and an interested party in the matter of said estate, and her heirship and interest was thereby declared to be fully and finally established; that the order and judgment of the county court be confirmed in each and every respect; and that the defendant was entitled to costs and disbursements against such devisees and their sureties. Judgment was ordered to be entered accordingly. From the judgment so entered the heirs at law and legatees and devisees named in said will appeal.

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The decision of the case turns upon the question whether the defendant was divorced from her former husband before she married the testator. It appears from the record and is undisputed that in or about 1870 the defendant married one Aschback, who died soon after; that March 15, 1872 or 1873, the defendant married one Edward Baehr in Germany; that in 1885 the defendant left Baehr and came to the United States, where she has since resided; that June 17, 1890, the defendant began an action for divorce against Baehr in the circuit court on the ground of wilful desertion; that June 18, 1890, the sheriff returned the summons that the defendant therein, Edward Baehr, could not be found; that June 21, 1890, an order was obtained from Judge JOHNSON in such divorce action for the service of such summons by publication; that August 18, 1890, the defendant went through the form of marrying the testator, but there is no claim that such marriage was valid; that on September 6, 1890, the following action by the circuit court, in effect, was taken and entered of record in the divorce action: that the plaintiff, Hermine Baehr, now comes "by her attorneys, and no one appearing for the defendant," Edward Baehr, "he being in default, upon proofs taken in open court judgment is ordered for plaintiff and against defendant." December 8, 1894, the defendant in this action was married to the testator.

Some time in 1903 the defendant had trouble with the testator and left him. November 10, 1903, the testator executed a will in which he stated, in effect, that he had married the defendant as his second wife, but that at the time of such marriage she had another husband living in Germany, and hence that his marriage to the defendant was null and void, and that she had left him, and consequently he was at liberty to dispose of his property to his children and grandchildren as therein expressed. April 15, 1904, the testator died, leaving children by his first wife and grandchildren by some of his deceased children. May 16, 1904, there was filed in the

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divorce action an affidavit duly verified by John M. Clarke, one of the attorneys of record for Mrs. Geith, the plaintiff in that action, wherein it was stated, in effect, that on June 21, 1890, he, as such attorney, deposited in the postoffice in Milwaukee a copy of the summons and complaint on file in that action, securely inclosed in an envelope, the postage duly paid thereon, addressed to the said Edward Baehr at his postoffice at Stargard, Pomerania, Germany, and left the same there to be carried without any direction to the postal officers upon such wrapper for the return thereof in case of nondelivery to the person addressed. Said Clarke further therein stated that he was informed and verily believed that before September 6, 1890, he duly filed with the clerk of said circuit court a proper affidavit showing such service by mailing; and that before September 6, 1890, the said Edward Baehr was duly and properly served by publishing the summons and by mailing the summons and complaint as above stated, all in accordance with the order of the court in the divorce action. May 19, 1904, an order was made by the court and entered in said divorce action, which, with the recitals therein, is as follows:

"Upon the records and files in the above-entitled action, Nohl & Nohl appearing as attorneys for the plaintiff, no one appearing to oppose, on the testimony of plaintiff and other witnesses taken in open court May 16 and May 18, 1904, in addition to the proofs of the allegations of the complaint heretofore taken in open court before this court, it satisfactorily appearing from such testimony, proof, and the orders heretofore made in the above-entitled action that the summons and complaint in the above-entitled action have been duly served on the above-named defendant, and that no answer or demurrer to the complaint has been served on the plaintiff or any person representing her as attorney; that due proofs of service of such summons and complaint on the defendant have been made; that the allegations set forth in the complaint have been duly proven; that the plaintiff has resided in the state of Wisconsin more than one year immediately preced-

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ing the commencement of the above-entitled action; that the defendant has been guilty of wilful desertion of the plaintiff for more than one year immediately preceding the commencement of this action, and has failed to support the plaintiff for a period of five years immediately before the commencement of this action and ever since, the action having been submitted to the court, now, upon motion of Nohl & Nohl as attorneys for the plaintiff, it is ordered that the marriage contract existing between the plaintiff and the defendant be and hereby is dissolved, and said plaintiff, Hermine Baehr, and said defendant, Edward Baehr, be and they hereby are forever divorced from the bonds of matrimony and freed from the obligations thereof *nunc pro tunc* as of the 6th day of September, 1890. Let judgment be entered accordingly."

Thereupon, and on said May 19, 1904, judgment was entered in said divorce action, as follows:

"This action having been at issue and having been heard before the above-named court, and the order of the court having been made and entered wherein and whereby the court orders judgment for the plaintiff and against the defendant, now, upon motion of Nohl & Nohl, attorneys for the plaintiff, it is hereby adjudged and decreed that the marriage contract existing between the plaintiff and the defendant be and hereby is dissolved; and it is further adjudged and decreed that said Hermine Baehr and said defendant, Edward Baehr, be and they hereby are forever divorced from the bonds of matrimony and freed from the obligations therein *nunc pro tunc* as of the 6th day of September, 1890.

"By the court: A. A. WIEBER, Clerk."

1. The claim on the part of the defendant that the notice of appeal to this court is insufficient and gives no jurisdiction because it is not in form directed to the clerk of the circuit court as well as her attorneys, is without foundation. The section of the statute relied upon does not require that it should be so directed, but simply that such notice shall be served "on the adverse party and on the clerk of the court in which the judgment or order appealed from is entered."

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Sec. 3049, Stats. 1898. The notice in question was duly filed with the clerk, and must therefore be deemed to have been served upon him. There is no claim that it was not duly served on the defendant's attorneys.

So the claim made under sec. 4013 of the Statutes, that the circuit court did not get jurisdiction because on the appeal from the county court the appellants did not give a bond running "to the judge of the county court" "for the security and benefit of all persons interested," seems to be without merit. That section has no application where the bond or undertaking is "required by law to be taken to the adverse party." Id. Here the controversy was between the heirs at law of Carl Geith, deceased, named as legatees and devisees in his will, and this defendant, claiming to be the lawful widow of said deceased. Such heirs at law, on their appeal from the county court to the circuit court and at the time of filing their notice of appeal, gave and filed with the county court an undertaking wherein they did undertake in the sum of $250 that they would diligently prosecute their appeal to effect and to pay all damages and costs which might be awarded against them on such appeal. That undertaking was "approved as to form, amount, and sufficiency of sureties" by the county court. Such undertaking conformed strictly to the statute. Sec. 4032, Stats. 1898. It was called for by the nature of the controversy and was certainly sufficient to give the circuit court jurisdiction. *C. & J. Michel B. Co. v. Estate of Wightman,* 97 Wis. 657, 73 N. W. 316; *Ellis v. Barron Co.* 111 Wis. 576, 87 N. W. 552; *Kasson v. Estate of Brocker,* 47 Wis. 79, 1 N. W. 418; *Charmley v. Charmley,* 125 Wis. 297, 301, 103 N. W. 1106; *In re Box's Will,* 127 Wis. 264, 106 N. W. 1063.

2. The appellants contend that the circuit court had no jurisdiction September 6, 1890, to order judgment for divorce for the reason that there was not at that time on file therein proof that a copy of the summons and complaint had

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been deposited in the postoffice as required by the statute. Subd. 4, sec. 2642, Stats. 1898. The answer to such claim is, as mentioned in the foregoing statement, that such proof consisting of an affidavit of John M. Clarke, one of the attorneys of record in the divorce action, was placed on file therein May 16, 1904, and showed such mailing and posting June 21, 1890. This court has recently held that it is the fact of service and not the mere proof of it that gives the court jurisdiction. *Schmidt v. Stolowski,* 126 Wis. 55, 105 N. W. 44. In that case it was expressly held:

"If the summons was in fact served upon defendants the court has jurisdiction, although the proof of service be faulty; and in such a case the court may, even after judgment, permit the record to be amended so as to show the service actually made." See *Estate of Newman,* 75 Cal. 213, 16 Pac. 887, 7 Am. St. R. 146.

So the mere fact that such affidavit showing the mailing and posting of copies of the summons and complaint, as required by the statute, was not on file June 21, 1890, did not deprive the court of jurisdiction to order judgment in the divorce action September 6, 1890.

3. It is claimed that the court had no jurisdiction to order judgment September 6, 1890, because the affidavit for publication was made and sworn to June 17, 1890, and the complaint was not filed or the order of publication made and entered until June 21, 1890. Sec. 2640, Stats. 1898. June 18, 1890, the sheriff returned that the defendant in the divorce action could not be found, and three days afterwards the complaint was filed with the clerk and the order of publication made and entered of record and copies of the summons and complaint mailed and posted. This court has held that the order of publication must follow the affidavit for the same "within a reasonable time." *Roosevelt v. Land & R. Co.* 108 Wis. 653, 84 N. W. 157; *Rockman v. Ackerman,* 109 Wis. 639; *Gallun v. Weil,* 116 Wis. 236, 243, 92 N. W.

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1091. In the case at bar we think the order of publication was made within such reasonable time.

4. The important question presented is whether the defendant in this action had been divorced from her former husband, Edward Baehr, before she was married to the deceased, Carl Geith, December 8, 1894. Of course, if she had not been so divorced before such marriage, then such marriage was "absolutely void, without any judgment of divorce or other legal proceeding." Secs. 2349, 2330, Stats. 1898. In obedience to such statutes this court has so declared. *Williams v. Williams,* 63 Wis. 58, 61, 23 N. W. 110. Upon full hearing of the divorce action and at the close of the trial thereof, the circuit court on September 6, 1890, declared that "judgment is ordered for plaintiff and against defendant." This is claimed to be a mere order for judgment, which did "not affect the status of the parties so as to render them capable of contracting marriage with others." In support of such claim counsel rely on *State v. Eaton,* 85 Wis. 587, 55 N. W. 890, where such language was used. That was a criminal action for adultery, and this court also held that "if the judgment, when entered, can for any purpose take effect from the date of the order therefor, it cannot operate to make an act a crime which was not so when committed, or, if then a crime, to make it one of a higher grade." The ruling of this court in that case seems to assume that when such judgment of divorce should be entered, pursuant to such order, it might take effect for some purposes "from the date of the order therefor." It has been held that "judgment of divorce, after being signed by judge and filed with clerk, is binding upon the parties and their privies, although not entered by the clerk." *Estate of Newman,* 75 Cal. 213, 16 Pac. 887, 7 Am. St. R. 146. In a later case in that state it was held:

"Judgment becomes rendered and the rights of the parties established at the time the court pronounces its decision; and it is not necessary to its validity that it should be in writing

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or signed by the judge. . . . Judgment of divorce becomes effective at the time of its rendition, although it is not entered by the clerk until a subsequent date." *Estate of Cook,* 77 Cal. 220, 19 Pac. 431; *Allen v. Voje,* 114 Wis. 1, 89 N. W. 924.

In ordering judgment for the plaintiff and against the defendant in the divorce action here under consideration there was no claim nor mention of alimony to be awarded as in the divorce action considered in *State v. Eaton, supra.* There can be no question but that the circuit court, in the language quoted above, pronounced judgment of divorce in favor of this defendant and against Edward Baehr, then residing in Germany. *German Am. Bank v. Powell,* 121 Wis. 575, 99 N. W. 222. There was nothing further to be done except for the clerk to enter judgment in obedience to such direction of the court. The court had fully performed its judicial functions. The clerk failed to perform his duty as clerk.

The question recurs whether upon the records of the court and the proofs taken in open court and the findings of the court made May 19, 1904, as to the facts as they were September 6, 1890, the trial court was justified in ordering judgment in the divorce action *nunc pro tunc* as of September 6, 1890, and whether the judgment entered May 19, 1904, pursuant to such order *nunc pro tunc* as of September 6, 1890, was binding and effectual in dissolving the marriage relation between this defendant and Edward Baehr as of September 6, 1890. After careful consideration we are constrained to hold that such judgment of divorce was binding and effectual. Thus it is said by Mr. Freeman:

"The entry of judgment *nunc pro tunc* is always proper when a judgment has been ordered by the court but the clerk has failed or neglected to copy it into the record." 1 Freeman, Judgm. (4th ed.) § 61.

In support of such proposition he cites, among other cases, *Howell v. Morlan,* 78 Ill. 162; *People ex rel. McCrea v.*

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Quick, 92 Ill. 580; *Metzger v. Marley,* 197 Ill. 208, 64 N. E. 280; *Belkin v. Rhodes,* 76 Mo. 643. So, on the authority of the *Estate of Cook, supra,* he states:

"If a judgment of divorce has been rendered which the clerk of the court has neglected to enter until after the death of one of the parties, he may be directed to enter it *nunc pro tunc* as of some day in the lifetime of the decedent, on application of one who was not a party to the cause, and when entered it becomes operative as of the day of its rendition, and, if collaterally drawn in question, it is conclusive as to all matters of evidence necessary to its validity." 1 Freeman, Judgm. (4th ed.) § 61.

So in 1 Black, Judgm. (2d ed.) § 130, it is said:

"The rule is that in any case where the court did actually render a formal judgment, but the same has not been entered on the record in consequence of any accident or mistake, or through the neglect or misprision of the clerk, the court has power to order that the judgment once pronounced be entered *nunc pro tunc,* upon the production of proper evidence to establish the fact of the judgment and to show its terms and character and the relief granted; and this may be done after the expiration of the term at which the judgment was originally given."

Many cases are there cited in support of the proposition.

We must hold that the defendant in this action was divorced from Edward Baehr September 6, 1890, and hence that the marriage of this defendant to Carl Geith December 8, 1894, was valid and binding. It follows that this defendant is the lawful widow of Carl Geith, deceased.

By the Court.—The judgment of the circuit court is affirmed.

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HURLEY, Respondent, vs. WALTER and wife, Interveners, Appellants.

October 10—November 7, 1906.

Replevin: Intervention: Equitable issues: Right to jury trial: Waiver: Bill of sale: Cancellation: Fraud: Oral trust: Enforcement: Amendment of pleading: Appeal: Costs.

1. Interveners in replevin claimed title under a bill of sale from plaintiff, and on their motion the court directed the complaint to be amended so as to make them defendants and charge them with setting up such claim. The amended complaint further alleged facts to show the alleged bill of sale invalid, and asked that it be set aside and plaintiff's title established. The interveners answered on the merits. *Held*, that the issues thus framed were equitable and that the interveners had waived any right which they might have had to a jury trial under sec. 2843, Stats. 1898.
2. Where, without fraud or mistake of fact, the owner of chattels executed a bill of sale transferring the title to another person, with the intention merely to empower the latter to pack and ship them, the court cannot set aside the instrument or convert it into a power of attorney merely because such person did not carry out the trust, although it may, under proper pleadings, enforce the trust.
3. Where, in such a case, the owner of the chattels had brought replevin for them against a carrier, and the vendee named in the bill of sale had intervened and claimed title, and plaintiff had thereupon asked to have the bill of sale set aside for fraud, the supreme court, on reversing a judgment for plaintiff on the ground that no fraud was proved, nevertheless authorizes the trial court to allow the complaint to be amended so as to raise the question whether the title had been placed in said vendee merely in trust.
4. In replevin against a carrier other claimants intervened, and the judgment, among other things, discharged the carrier from liability. On appeal from the whole judgment, no error being assigned as to that portion of it, and the carrier not having appeared, the judgment is affirmed as to the carrier without costs, under the discretion given by sec. 2949, Stats. 1898.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed in part; reversed in part.*

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This was originally an action of replevin commenced by the plaintiff against the Chicago, Milwaukee & St. Paul Railway Company to recover possession of a quantity of surgical instruments, books, medicines, etc., which were in possession of the railway company at Milwaukee as common carrier, consigned to the intervener *Tillie Walter*. An affidavit for immediate delivery was made and an undertaking given, and the goods were seized and delivered to the plaintiff. The railway company answered, denying wrongful detention and denying knowledge as to plaintiff's ownership or right of possession, and alleging that it held the goods as common carrier, and that *Tillie Walter* was named as consignee. Subsequently the appellants, who are husband and wife, petitioned the court to be let in as defendants, claiming to be the owners of the property in question by virtue of a bill of sale made by plaintiff to the appellant *Alexander Walter*, and a second bill of sale by *Alexander* to *Tillie*. The court made an order allowing them to intervene and directing amendment of the summons and complaint.

By the second amended complaint the plaintiff alleged that prior to September 6, 1904, he was a physician in good practice at the city of Detroit and owned the property in question, and at about that time made an arrangement with the appellant *Alexander* (also a physician) to go into partnership with him and establish a sanitarium at Milwaukee and ship the goods in question to Milwaukee for use in the business; that it was agreed that *Hurley* should go to Milwaukee in advance to find a location, and that *Alexander* should remain in Detroit for a time and crate, pack, and ship the goods, and that *Hurley* should give *Alexander* written authority empowering him to so handle and ship the goods; that they went to a lawyer's office to execute an agreement of partnership and a paper authorizing *Alexander* to pack and ship the goods; that plaintiff was unable to read without glasses, owing to an infirmity of the eyes, and had broken his glasses, and that the

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appellant *Walter* falsely and fraudulently induced him to sign a bill of sale of the goods, representing that it was simply a paper authorizing him to pack and ship the same; that there was no consideration for the bill of sale; that *Alexander* afterwards, without consideration, pretended to convey the goods to the appellant *Tillie*. Judgment was demanded setting aside the bill of sale and declaring the same a power of attorney, and that plaintiff's right in the property be established, and for such other relief as should be just and equitable. To this complaint the interveners answered, denying plaintiff's ownership of the property, and claiming that the goods were actually sold by the plaintiff to the intervener *Alexander*, and by him sold to his wife, *Tillie*.

The case came on for trial, and the interveners demanded a jury trial, but the demand was overruled and the case tried by the court. The plaintiff's witnesses were examined, but the interveners offered no testimony except the bill of sale from *Alexander* to *Tillie*. The court made findings of fact in effect finding the original ownership of the property, the agreement to form a partnership, and the agreement to give *Alexander* authority to pack and ship the goods, substantially as alleged in the complaint. The court further found that the plaintiff signed the bill of sale with the intention of authorizing *Alexander* to pack and ship the goods, and that it was entirely without consideration. As conclusions of law the court found that a title to the goods was in the plaintiff, that the bill of sale was in fact a power of attorney, that the plaintiff had the right of possession of the same and should recover costs of the interveners. Judgment was entered in accordance with the finding in favor of the plaintiff and against the interveners, and discharging the railway company from any further liability, and the interveners appeal.

For the appellants there was a brief by *W. E. & F. P. Burke*, and oral argument by *W. E. Burke*.

For the respondent there was a brief by *Schwefel & Knoell*, and oral argument by *A. G. Schwefel*.

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WINSLOW, J. The appellants' first contention is that it was error to refuse a jury trial. An issue of fact in an ordinary replevin action is, of course, an issue for the jury. Sec. 2843, Stats. 1898. Whether it remains a jury issue after the original defendant has brought the property into court and procured the substitution of a rival claimant as defendant under the last clause of sec. 2610, Stats. 1898, may be a question open to doubt. It has been held in New York, under a similar statute, that in an action on an insurance policy, where the original defendant has brought the money into court and a rival claimant has been substituted as defendant, the action becomes an equitable one in the nature of the old action of interpleader. *Clark v. Mosher,* 107 N. Y. 118, 14 N. E. 96. The present case, however, was not a case of substitution of a rival claimant upon deposit of the fund or property in court, but simply a case under the first clause of the section cited, where third parties on their own application and for the protection of their alleged interests in the subject matter of the controversy were interpleaded as additional defendants, the original defendant being still before the court. It is very apparent that, under the broad provisions of this section, equitable claims of various kinds may be injected into an action at law, and that the proper method of disposition of the issues so raised may not be free from doubt and difficulty. We do not think, however, that we are obliged to enter this field in the case before us.

If it be conceded that the interveners originally had a right to a jury trial, they could waive that right if they chose, and we think they have effectually done so in this case. The order of intervention made upon the motion of the interveners required the plaintiff to amend his summons and complaint so as to make the interveners defendants, "with apt words to charge them as setting up such claim as their petition sets forth, as plaintiff may be advised," and gave the interveners the usual time after service to answer such amended complaint. The petition of the interveners set

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forth title under the bill of sale, and thus by the order of intervention the plaintiff was required to set forth in an amended complaint the interveners' claim under the bill of sale, and he must *ex necessitate* meet that title and show by his complaint that it was invalid, by other allegations in his complaint, or be turned out of court. He did this by serving a complaint which is unmistakably a complaint in equity, asking for the setting aside of the instrument and the quieting of the interveners' claim of title. To this complaint in equity the interveners made answer upon the merits, thus forming an equitable issue by consent. It appears by the recitals of the findings that when the case was called for trial all parties, including the railway company, appeared by their respective counsel, and that the counsel for the railway claimed that, the property having been delivered to the plaintiff and the consignee having become a party defendant, "the case should proceed upon the issues in said action between the plaintiff and the interpleaded defendants, and this idea was acquiesced in by all concerned," whereupon the case proceeded to trial. The issues between the plaintiff and the interveners, as they had been framed, were distinctly equitable issues, and we think that under the facts stated the interveners had waived any right which they might have had to a jury trial and consented that the action should be treated and tried as an action in equity.

The question remains, however, whether any fraud was proven sufficient to justify the cancellation of the bill of sale. The complaint charged substantially that the bill was signed by the plaintiff without knowledge of its contents, relying upon fraudulent representations as to its character made by *Walter,* and under circumstances excusing the plaintiff's neglect to read it. The evidence of the plaintiff himself, however, showed beyond question that he knew he was signing a paper purporting to put the title of the property in *Walter;* but he insists that it was simply done so that it would appear

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that *Walter* owned the goods, in order that he would have no trouble in packing and shipping them. In accordance with this testimony the court found neither fraudulent representations as to the character of the instrument by *Walter,* nor ignorance of its character by the plaintiff, but simply that plaintiff signed it with the intention of empowering *Walter* to pack and ship the property, that there was no consideration paid, and hence that the instrument was in fact simply a power of attorney. We have been unable to follow the trial court to the conclusion reached. If without fraud or mistake of fact the plaintiff deliberately chose to execute an instrument transferring the title of his property to *Walter,* in trust for certain purposes, the court cannot set aside the instrument or convert it into a power of attorney because *Walter* did not carry out his trust. A valid trust in personal property may be created by parol. 1 Perry, Trusts, § 86. If the title was placed in *Walter* simply in trust for certain purposes, doubtless *Walter* may be compelled to carry out his agreement, and the trust may be enforced under proper pleadings; but no such contention was made by the pleadings. The only issue raised or tried was the issue of fraud, and on this the plaintiff has failed.

This conclusion necessitates reversal of the judgment. We are not inclined, however, to direct judgment without giving the plaintiff opportunity to try the real question in the case. No reason is perceived why the question as to the creation of a trust in the property may not be tried out in this action, and the mandate will so provide. The judgment discharges the railway company from further liability, and the notice of appeal served upon the railway company as well as upon the plaintiff states that the appeal is taken from the whole judgment. No assignment of error, however, is made or argued upon this part of the judgment, hence, as to the railway company, the judgment will be affirmed. The railway company did not appear in this court, and the affirmance will be with-

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out costs, under the discretion given to this court by sec. 2949, Stats. 1898, in cases where the judgment is affirmed as to some parties and reversed as to others.

By the Court.—That portion of the judgment discharging the defendant railway company from liability is affirmed, without costs; the remainder of the judgment is reversed, with costs, and the cause remanded with directions to enter judgment dismissing the complaint unless the trial court, upon notice and application made within thirty days after service of notice of the *remittitur* herein, shall in its discretion, and upon such terms as may be just and equitable, grant leave to the plaintiff to amend his complaint so as to raise the question of trust as indicated in the opinion, in which case a new trial shall be had.

HARLEY, Respondent, vs. LINDEMANN and others, Appellants.

October 11—November 7, 1906.

***Public schools: Illegal change in text books: Equity: Injunction: Adequate remedy by* mandamus.**

1. A motion to vacate a temporary injunction challenges the sufficiency of the complaint.
2. If a school board makes an illegal change in text books, *mandamus* will lie to compel recognition of the right of pupils to use the books illegally discarded.
3. An injunction should not be granted at the suit of a parent of school children to prevent a threatened illegal change in text books, since if such change be made it will work no irreparable injury and the remedy by *mandamus* will be adequate.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

This is an appeal from an order continuing a temporary injunction. The action was equitable to restrain persons as-

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suming to act as the board of school directors of the city of Milwaukee from carrying out a threatened purpose to make a change in text books used in the schools of such city.

The following is a fair synopsis of the amended verified complaint which is the foundation of the order appealed from: Plaintiff complains on behalf of himself and others similarly situated. He is a citizen and taxpayer of the city of Milwaukee and a patron of its public schools, having three children attending the same. The defendants claim to have been appointed and assume to act as members of the school board of said city, and threaten as such board to abolish the use of certain text books in use in the public schools of such city and to adopt others in place thereof. Said defendants for their authority to act as members of such board refer only to ch. 273, Laws of 1905, which in fact confers no authority upon them. Such chapter purports to create a board of school directors for said city and provides that a committee consisting of the president of the board and four members selected by him shall examine, certify, employ, classify, transfer, and promote teachers, subject to amendment, rejection, or confirmation by the board; that a committee also consisting of the president and four members selected by him shall be appointed to select and determine the courses of study and text books to be used, subject to approval by the board, as in case of teachers. Said chapter further purports to confer upon said board power to make by-laws for its own government and the government of the schools of said city, and also the usual powers exercised by similar boards. Prior to November 1, 1905, the defendants adopted a rule that the two committees mentioned should consist of the same persons; also a rule of procedure for the change or adoption of text books, to the effect that the superintendent of schools shall, prior to March 1st in each year, receive such suggestions as may be offered respecting such subject and by May 15th thereafter submit to the committee on courses of instruction

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the text books and list of changes which he deems advisable to have considered with his reasons therefor; that at the regular meeting in April thereafter such committee shall report to the board a list of subjects out of the list submitted by the superintendent regarding which the committee will consider the change or adoption of text books, such report to serve as a notice to the publishers of such books enabling them, if they wish, to submit samples and prices; and that at the regular meeting in May thereafter the committee shall report to the board such changes or adoptions out of such list as may be recommended by the superintendent and approved by the committee, which report shall be acted upon finally by the board at the regular meeting in June thereafter. Plaintiff is informed and believes that the defendants threaten to, and unless restrained by the court will, abolish Harper's Readers in the grades numbered from two to five inclusive in such school and substitute therefor Stepping Stones to Literature, books 1 to 6 inclusive, which are more expensive though inferior to said Harper's Readers. By reason of the premises defendants purpose without any authority of law to force the patrons of said school to purchase more expensive and less suitable books than those in use, though propositions have been made to furnish cheaper and better books than the said Stepping Stones to Literature in case Harper's Readers are to be abolished. Such propositions included offers to furnish such superior books in place of Harper's Readers free of cost, while the proposition of the board is to compel the surrendering of Harper's Readers and payment of eighteen cents to thirty-five cents per copy for the new books, to the injury of the patrons of the schools in the aggregate of about $10,000, and to their irreparable injury. When the board makes a change in text books the law prohibits any subsequent change in that particular regard under five years, so that defendants, in case they shall be permitted to proceed, will impose on the patrons of the schools of said city the burden of

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purchasing from time to time the new books for a period of five years. The defendants in fact have no lawful authority to do the act so threatened. Plaintiff and those similarly situated are remediless to prevent the doing of such threatened act and the subsequent loss to them, unless a court of equity will interfere in their behalf.

There was a proper prayer for permanent relief and for an *interim* injunction restraining defendants from doing the alleged threatened act during the pendency of the litigation. The temporary restraining order was granted. The defendants by verified amended answer admitted that they claimed to be members of the board of school directors of the city of Milwaukee, deriving their authority from ch. 273, Laws of 1905, and alleged that they were in fact duly qualified members of the school board of said city and as such had full authority to make the change in text books sought to be prevented; that so far as they had gone in the matter they had proceeded in due course under such law and the rules of the board adopted pursuant thereto; that the recommendations of the committee to make the change in text books mentioned in the complaint was pending before the board; that until action thereon by such board defendants could not state whether Harper's Readers would be displaced by Stepping Stones to Literature, but that whatever the board should finally do in the matter would be pursuant to and justified by such chapter. The answer contained appropriate allegations putting in issue that part of the complaint charging the committee of the board in considering the matter of changing text books with indiscreet conduct, and allegations to the effect that all proceedings in respect to the matter were justified by said law of 1905.

At the outset on a verified complaint a temporary injunction was granted. Upon the amended pleadings and affidavits a motion made by defendants for an order vacating such temporary injunction was considered and denied, the court

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rendering an opinion in the matter showing that as it viewed the same it turned on the constitutionality of ch. 273, Laws of 1905. Such opinion was to the effect that the constitutionality of the act was challenged, *first,* because it was a private law attempting to amend the charter of the city of Milwaukee; *second,* because it violated the uniformity of the school system contrary to the constitution; *third,* because it imposed upon circuit judges nonjudicial duties. The court disapproved of the second and third grounds but expressed an opinion that the first ground was well taken, but nevertheless overruled plaintiff's contention in that regard and refused to declare the act unconstitutional and continued the temporary injunction upon the theory that there was a probability that plaintiff might finally recover, in which event, without the temporary restraining order being left in force, the judgment would be ineffectual, and that to continue the same during the litigation would not injure defendants or the public. From the order accordingly entered refusing to vacate the temporary injunctional order defendants appealed.

For the appellants there were briefs by *John T. Kelly,* city attorney, and *Benjamin Poss,* assistant city attorney, and *James G. Jenkins,* of counsel, and the cause was argued orally by *Mr. Kelly* and *Mr. Poss.*

For the respondent there was a brief by *A. C. Umbreit,* attorney, and *Charles Quarles,* of counsel, and the cause was argued orally by *Mr. Umbreit.*

MARSHALL, J. The order complained of, as will be seen from the statement, was entered upon the theory that ch. 273, Laws of 1905, may be unconstitutional and that respondent may on that account finally obtain judgment as prayed for, and that without the *status quo* being preserved in the meantime the purpose of the litigation will nevertheless be defeated, to respondent's irreparable injury, while such preservation will not work any material damage to the public.

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The motion to vacate the temporary injunction challenged the sufficiency of the complaint (*Judd v. Fox Lake*, 28 Wis. 583), so all questions in that regard are before us for consideration.

It is a cardinal principle in the administration of justice that a legislative enactment should not be adjudged void in any action unless the solution of the question in that regard is deemed necessary in order to reach a just conclusion in the cause. That rule, it seems, should be given all the force reasonably attributable thereto in this case, since the constitutional question considered by the trial court, and upon which counsel for respondent relies, has not been argued upon the opposite side. Counsel for appellants insist that the facts alleged in the complaint afford no ground for the relief prayed for, even if the law of 1905 be invalid as claimed. So, as stated, they have declined to reply to counsel for respondent on the constitutional question.

Up to the time of the commencement of the action, as shown, no injury had been done to respondent. The most that is claimed is that a wrong was threatened and unless prevented by the court the threat would be carried out. So the purpose of the action is to guard against the mere danger of such threat being executed. The change in text books sought to be prevented, obviously, cannot occur till the school board shall have adopted the report of its committee recommending the same. There is no showing of facts in the complaint, nor can it be implied, that should such adoption occur plaintiff would not thereafter have ample opportunity by some appropriate action to prevent any injury to him. The situation is wholly unlike those where the issue of municipal bonds was threatened, which might go into the hands of innocent purchasers and in such hands be valid obligations, or there was a threatened improper diversion or disbursement of public money or disposal of public property, any of which threats would necessarily involve danger of irremediable pe-

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cuniary loss to the taxpayers of the municipality. The following were cases involving such situations: *Peck v. School Dist. No. 4,* 21 Wis. 516; *Lawson v. Schnellen,* 33 Wis. 288; *Lynch v. E., La F. & M. R. Co.* 57 Wis. 430, 15 N. W. 743, 825; *Willard v. Comstock,* 58 Wis. 565, 17 N. W. 401; *Fowler v. Superior,* 85 Wis. 411, 54 N. W. 800; *Kyes v. St. Croix Co.* 108 Wis. 136, 83 N. W. 637. Here the threatened act if carried out would not involve any irreparable injury whatever to respondent unless he would be entirely without an adequate remedy for any wrong done to him in case of the action being illegal.

Counsel, fully recognizing that it was essential to a good complaint in the action to show that if the threatened act was not prevented it would occur not only to his injury but to his irreparable loss, alleged "plaintiff and those similarly situated have no adequate remedy at law in the premises and are helpless to prevent the great loss and expense" referred to in the complaint "unless a court of equity shall interfere to prevent same." Consistently with that, as we understand it, counsel conceded on the argument that unless the equitable remedy invoked when the action was commenced was necessary to plaintiff's protection, it was improperly invoked.

Obviously, the mere act of the board, should it approve the report of its committee as to making the change in text books recommended, would not injure respondent. The injury would come to him, if at all, when the determination of the board should be enforced by denying to his children the benefit of the public schools unless he complied with the new regulation, and he could then, as it seems, by a plain legal action of *mandamus* redress the wrong, fully, by compelling recognition of the right of his children to such benefits regardless of such regulation, as was done in *State ex rel. Adams v. Burdge,* 95 Wis. 390, 70 N. W. 347. There the relator's children had been denied school privileges except upon condition of their submitting to a regulation of the state board

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of health requiring applicants for such privileges to present certificates of vaccination. The same principle was applied in *State ex rel. Bowe v. Board of Ed.* 63 Wis. 234, 23 N. W. 102, and *State ex rel. Smith v. Board of Ed.* 96 Wis. 95, 71 N. W. 123. In the former the court held as a general principle, as stated in the syllabus:

"The parent of a child wrongfully suspended from a public school may proceed directly, by *mandamus,* against the board of education which has the power and whose duty it is to reinstate the child."

In the latter the wrongful exaction of a tuition fee by the teacher and principal of the school as a condition of allowing a pupil to remain in school, was remedied by a *mandamus* action. The following cases from other jurisdictions are to the same effect: *State ex rel. Flowers v. Board of Ed.* 35 Ohio St. 368; *State ex rel. Roberts v. School Directors,* 74 Mo. 21; *Smith v. Directors,* 40 Iowa, 518; *Dove v. Independent School Dist.* 41 Iowa, 688; *People ex rel. Workman v. Board of Ed.* 18 Mich. 400; *Ward v. Flood,* 48 Cal. 36. *State ex rel. Flowers v. Board of Ed., supra,* seems to be directly in point on the facts and principle involved as well. There had been an illegal change in text books determined upon and put in execution. The procedure leading up thereto was very much the same as that detailed in the complaint in this case. A *mandamus* action was thereupon commenced compelling the board of education and the superintendent of schools to allow the relator's child and all other pupils in the school to use the text books claimed to have been illegally discarded. The question of whether the relator invoked the proper remedy was specially considered and decided in the affirmative, the court, speaking by GILMORE, C. J., saying:

"The relator was a resident taxpayer of the city of Columbus and of the school district, and was also the father of a child who was of school age, who was attending school in the city, and for whose use, in school, he had purchased and paid

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for Harper's geographies . . . He had, therefore, a pecuniary, and also a parental, interest in having the public schools of the district controlled and conducted in the manner prescribed by the statute; and these interests are sufficient to enable him to maintain this proceeding."

The same remedy was resorted to, to reinstate a pupil excluded from the schools on the ground of color, the superintendent of schools being proceeded against, in *Ward v. Flood, supra;* and in *Smith v. Directors, supra,* the same remedy was used for a like purpose. See, also, Merrill, Mandamus, § 115, and High, Extr. Leg. Rem. (3d ed.) § 332.

An examination of the authorities referred to shows very clearly that in all cases where a child who is entitled to attend the public schools is illegally excluded therefrom upon any ground, or who has been received into such schools and is nevertheless illegally deprived of his rights therein, the parent or guardian of such child is clearly entitled to the legal remedy by *mandamus* to redress the wrong.

It follows from the foregoing that,—admitting all the allegations in the complaint to be true as regards want of authority of the defendants to do the alleged threatened act; that such want of authority grows out of ch. 273, Laws of 1905, being unconstitutional; and that unless restrained by the court they will adopt the report of the committee as to changing text books and put their determination in force,—instead of respondent and those similarly situated being, as alleged, helpless to redress the wrong done to them, the legal remedy by *mandamus* will be available for that purpose; will afford a safe, speedy, and efficient remedy; and the use of it under the circumstances will be in accordance with the uniform practice of this court and of courts generally.

So we have presented the question of whether, in case of a mere threatened act of a public nature which in case it should occur would injuriously affect taxpayers and citizens of the municipality, but not irreparably, because of a plain legal,

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speedy, and adequate remedy to redress the wrong, the jurisdiction of equity should be usable to prevent the threat from being carried out. It seems that the decision must be in the negative and that the question is thus ruled by several decisions of this court, particularly *Judd v. Fox Lake,* 28 Wis. 583; *Gilkey v. Merrill,* 67 Wis. 459, 30 N. W. 733; and *Sage v. Fifield,* 68 Wis. 546, 32 N. W. 629. In the first case cited, after stating the facts alleged showing the claim of the plaintiff to be that there was merely an injury threatened, which, should it occur, would be remediable, the court said:

"The complaint presents, therefore, the naked question, whether under such circumstances the aid of equity can be successfully invoked to declare in advance that certain acts of public officers, proposed or threatened in the future to be done, will, if performed, be illegal and void. We are clearly of the opinion that it cannot."

In the last case cited, which was a taxpayer's action to restrain a threatened injury, the court, speaking by Justice TAYLOR, said:

"If the authorities of the municipality fraudulently squander its property and assets the taxpayer is irreparably injured, because it necessitates the collection of greater taxes to pay the legitimate charges against the municipality; and unless, therefore, the taxpayer can restrain the unlawful and fraudulent disposition of such property of the municipality, he is entirely remediless. None of the cases in this court, since the case of *Judd v. Fox Lake,* are in conflict with the decision in that case. The rule there laid down was approved and acted upon in the case of *Gilkey v. Merrill,* 67 Wis. 459, 30 N. W. 733. We think that the circuit court should have dissolved the injunction on the ground that the complaint did not state facts sufficient to constitute an equitable cause of action."

From what has been said we feel bound to hold that the complaint fails to state any cause of action. If any action could be brought in equity at all it could not properly be commenced because of a mere threatened illegal act, which, if it

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were to occur, would be readily remediable. This renders it unnecessary to examine the constitutional question so ably presented by counsel for respondent.

By the Court.—The order is reversed, and the cause remanded with directions to vacate the temporary injunctional order.

DAVIDOR, Appellant, vs. BRADFORD, Respondent.

October 11—November 7, 1906.

Contracts: Breach: Minimizing damages: Partnership: Contribution: Pleading: Judgment.

Plaintiff and defendant agreed to purchase jointly 20,000 shares of stock in a mining company, defendant to give his notes to the company for $1,750 therefor, and plaintiff to give his note for $875 to defendant. Plaintiff also agreed to devote his time to selling the stock, and that he would sell the same at advanced prices and would realize proceeds therefrom to pay all the notes before they were due. The purchase was made and the notes given, but plaintiff failed and refused to make any effort to sell the stock or to pay his note to defendant. Defendant thereupon made a settlement with the mining company by which he surrendered 10,000 shares of the stock and received back one of his notes for $875, but was obliged to pay the other. The stock was then unsalable. Plaintiff sued to have his note to defendant canceled, offering to pay any sum which might be found to be actually due from him to defendant. Defendant counterclaimed on the contract for the whole amount he had been obliged to pay. He had judgment for one half of such amount, and was required, on payment thereof by plaintiff, to deliver to the latter one half of the 10,000 shares of stock. *Held:*

(1) Defendant had the right to make the settlement with the mining company either to minimize his damages from plaintiff's breach of the contract or, as a partner, to promote the best interest of the joint enterprise.

(2) Even if the full time for performance of plaintiff's agreement had not then expired, his declaration that he would not perform was such an anticipatory breach as gave defendant a right to treat the contract as terminated and take measures accordingly

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(3) Upon the facts defendant had a cause of action against plaintiff for breach of the contract, and also a right of action for contribution from plaintiff of one half the expense necessarily incurred in the joint enterprise.

(4) The judgment was not erroneous as against plaintiff, whether considered as based on the counterclaim or on the offer made in the complaint.

APPEAL from a judgment of the circuit court for Milwaukee county: E. RAY STEVENS, Judge. *Affirmed.*

Plaintiff, being solicitor for the sale of stock of a certain mining company, approached defendant and represented to him that a block of 20,000 shares of stock could be obtained at price of eight and three-fourths cents per share, and that he, the plaintiff, could promptly dispose of said stock in smaller lots at thirty or thirty-five cents per share, and proposed that the two jointly purchase such block of 20,000 shares, defendant to give his notes to the company for $1,750 therefor, and the plaintiff to give his note to the defendant for half, viz., $875, and agreed that the plaintiff should at once devote his time to selling said stock, and would realize proceeds therefrom to pay all of said notes before they were due. Such agreement was entered into and the respective notes given, but plaintiff made no effort to sell stock or pay his note to the defendant, and when defendant's notes to the company became due he was unable to pay them and plaintiff refused to pay his note and notified the defendant that he would not carry out his part of the agreement either in that respect or by selling the stock, whereupon the defendant secured an adjustment with the company whereby he surrendered one half of his stock subscription and received back one of his notes, but was obliged to pay one note of $875 and received a certificate of 10,000 shares of stock. Said stock was at the time unsalable, and, as the court found, such settlement was for the best interest of the joint enterprise to relieve them from further loss and was made necessary by failure of the plaintiff to perform his part of the agreement.

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Some time thereafter plaintiff commenced this suit to procure a cancellation of his note, then overdue and in the hands of the defendant, praying that it be adjudged void and be delivered up and the defendant restrained from attempting to transfer or collect it, and for general relief; offering to pay any sum which might be found to be actually due from plaintiff to the defendant.

Defendant answered, setting up substantially the foregoing facts, and, by way of counterclaim, prayed recovery from the plaintiff of the whole sum he had been obliged to pay to the company by reason of plaintiff's misrepresentations and failure to carry out his contract. Upon the trial all claims in tort were abandoned and recovery according to contract rights was insisted on.

The court made findings substantially in accord with the foregoing statement and rendered judgment that the plaintiff pay defendant one half of $875 paid by the latter, to wit, $437.50, and that the plaintiff's note be canceled as an obligation against him, and that the defendant hold the 10,000 shares of stock for the joint benefit of plaintiff and defendant, to be delivered to purchasers when sold and the proceeds retained by the defendant and applied to the repayment of the sum which he had paid for the stock, or, upon payment of the judgment, one half thereof to be delivered to the plaintiff, from which judgment the plaintiff appeals.

For the appellant there was a brief by *William Kaumheimer,* and oral argument by *Mr. Kaumheimer* and *Mr. C. H. Hamilton.*

For the respondent there was a brief by *Kanneberg & Cochems* and *Harry M. Silber,* and oral argument by *Mr. Silber.*

Dodge, J. We have no difficulty in finding support for the findings of the trial court, if not always in direct words of any witness, at least in the inferences reasonably deducible from the facts and situation shown; especially in view of the fact that the plaintiff's veracity stands impeached both by

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undisputed proof of reputation and by intrinsic evasions and self-contradiction. The situation presented, then, is a joint enterprise rendered hopeless of profit by plaintiff's failure and refusal to perform his agreed duty therein. Thereby defendant was laden with a quantity of unsalable mining stock and confronted with the liability to pay $1,750 which could be considered only as loss. At this point either or both of two rules of law became applicable. The contract being breached in a respect rendering its accomplishment impossible, defendant had the right, nay owed a duty, to exercise due diligence to minimize his damages. Also, as one engaged in a joint enterprise, in effect a partnership, he was entitled to use his best judgment and efforts to promote the welfare of that joint enterprise by disposing of the property thereof to the best advantage possible, and paying what was unavoidable to prevent further loss. *Bradley v. Denton,* 3 Wis. 557; *Hill v. Palmer,* 56 Wis. 123, 14 N. W. 20; *Ward v. Am. H. F. Co.* 119 Wis. 12, 25, 96 N. W. 388; *Kelley, Maus & Co. v. La Crosse C. Co.* 120 Wis. 84, 97 N. W. 674; *Bates v. Lane,* 62 Mich. 132, 28 N. W. 753; *Lee's Ex'x v. Dolan's Adm'x,* 39 N. J. Eq. 193. Even if the full time for plaintiff to perform his part of the contract had not expired, his deliberate declaration that he would not perform, either by marketing the mining stock or paying his half of the price, constituted such an anticipatory breach as gave the defendant a right to treat the contract as terminated and to take measures accordingly. *Kelley, Maus & Co. v. La Crosse C. Co., supra; Merrick v. N. W. Nat. L. Ins. Co.* 124 Wis. 221, 102 N. W. 593; *Woodman v. Blue Grass L. Co.* 125 Wis. 489, 103 N. W. 236, 104 N. W. 920; *Roehm v. Horst,* 178 U. S. 1, 20 Sup. Ct. 780. The findings fully establish that the surrender of half of the mining stock at cost price was beneficial, and beyond any price obtainable by him otherwise; hence it is not open to criticism, whether viewed as an attempt to minimize damages or an act by one partner in protecting the joint property and interests.

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From the above-stated situation there doubtless resulted to defendant a cause of action for damages by reason of plaintiff's breach of his agreement and also a right of action for contribution from plaintiff of one half of the expense necessarily incurred in the joint enterprise. *Hill v. Palmer, supra.* The adoption of the latter alternative by the court is favorable to plaintiff, for the evidence is clear that the profits which would have resulted to defendant from performance of plaintiff's agreement to sell the stock at thirty or thirty-five cents per share, and which defendant has lost by the breach, would have far exceeded the present recovery.

Some contention is made that defendant breached the contract in that he never procured the actual issue to himself of a certificate for the 20,000 shares so that plaintiff could have it in his possession to make sales. To this there are two very sufficient answers: First, the evidence preponderates in favor of the agreement that the stock was to remain to the credit of the defendant upon the company's books and to be issued from time to time to any customers the plaintiff found, in certificates for the amount sold them; and, secondly, it was the plaintiff and not the defendant who was to procure the assent of the company to the issue of 20,000 shares of stock upon defendant giving his notes for $1,750. Hence there is in this no obstacle to defendant's recovery.

It is quite immaterial whether or not the judgment in this case be considered as rendered upon, and supported by, defendant's counterclaim, whether that be construed as an action at law for damages for breach of contract or a demand merely for a contribution from a partner, either in law or equity. The cause of action set forth in the complaint is one in equity for the cancellation of plaintiff's note, accompanied by an offer of such sum as the defendant may be entitled to from him. The answer sets up all the facts, as well by way of defense as of counterclaim; hence the rights of the parties arising out of the transaction were all submit-

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ted to the equitable jurisdiction of the court, and its decision that plaintiff should pay to the defendant one half of the expense incurred by him in this enterprise is with sufficient propriety, and certainly without prejudice to the plaintiff, embodied in a judgment for the recovery of that sum, guarded, as that judgment is, by full provision for protection of plaintiff against all further liability on his note, and for the transfer to him of one half of the 10,000 shares of stock held by the defendant for their joint interest whenever plaintiff shall pay.

By the Court.—Judgment affirmed.

MORICE, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

October 11—November 7, 1906.

Street railways: Injury to person crossing tracks: Contributory negligence.

Plaintiff alighted from the rear of an electric car going north on the eastern of two parallel tracks, between which was a space of four and one-half feet. He stepped back a short step to the east and looked north, but saw no car approaching, his view being obstructed by the north-bound car. He then crossed to the west behind that car and did not again look to the north until just before he reached the western track. He then stopped and looked, and as he did so was struck by a car going south on that track at a high rate of speed. Had he looked after passing the west rail of the eastern track, while still in a place of safety, he could have seen the car approaching. He was familiar with the locality and knew that a car was likely to pass at any time at a fairly good rate of speed. *Held*, that he was guilty of contributory negligence as a matter of law.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an action for damages on account of personal injuries sustained by plaintiff by reason of being struck and

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injured by one of defendant's street cars in the city of Milwaukee on April 1, 1903. In the city of Milwaukee, Downer avenue runs north and south and is intersected at right angles by Summit Place. Defendant operated a double-track line of electric railway consisting of two parallel tracks along and upon Downer avenue. The tracks extend from Summit Place directly north without curve for a distance of six or seven blocks—one half or three quarters of a mile,—and from the intersection of the two streets in question a car can be seen coming from the north for a distance of five blocks. The gauge of each track, or the distance between the rails, was the standard gauge, four feet eight and one-half inches. The width of space intervening between the easterly and westerly tracks was four feet nine and one-half inches, measured from the center of the rails, or four feet six inches from the outside of one track to the outside of the other. The car from which plaintiff alighted, and also the one which came from the opposite direction and struck him, was forty-one feet in length over all, and forty-three feet including the fender. The steps of these cars project about eighteen inches beyond the rails, and the body of the car about twelve inches. On the 1st day of April, 1903, at 9 p. m., plaintiff, who had been carried northward upon Downer avenue upon defendant's electric railway, alighted from the rear platform of the car at the north crosswalk at the intersection of Summit Place and Downer avenue. The car from which he alighted was proceeding on the easterly track, and, after he alighted, the car proceeded, and plaintiff walked across the track behind the car, and was struck, while crossing the space between the two tracks and just before entering upon the westerly track, by a south-bound car. From a judgment directing a verdict in favor of defendant plaintiff appeals.

For the appellant there were briefs by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill.*

Clarke M. Rosecrantz, for the respondent.

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KERWIN, J. The only questions involved upon this appeal are: (1) Negligence of defendant; (2) contributory negligence of the plaintiff. If the plaintiff was guilty of contributory negligence he cannot recover, and the question of negligence of the defendant need not be considered.

It appears from the evidence without dispute that the plaintiff alighted from the rear platform on the east side of the car going north upon the east track; that he stepped back a short step to the east and looked north, but saw no car approaching; that he waited until the car from which he alighted moved on, then walked slowly behind the north-bound car across the east track, listening for the sound of an approaching car, or gong, but heard neither; that when he got between the east and west tracks he stopped and looked north to learn whether any car was coming, and as he did so a south-bound car on the west track going at a high rate of speed struck him and threw him backward a distance of from twenty-five to thirty feet; that the car from which he alighted stopped at the usual and customary place on the north crosswalk; that plaintiff listened up to the time he was struck; that the car in which he was traveling, as well as the one which struck him, was well illuminated by electricity, with windows all around and so situated as to emit light therefrom; that the car which struck him had a headlight burning. The point of injury was in the suburbs of the city between three quarters and one mile inside of the city limits. Plaintiff had lived for a period of about six months about two blocks from the point where he alighted. This portion of the city is well settled, there being quite a number of residences there and considerable travel on the streets. Plaintiff was familiar with the speed at which the cars ordinarily ran at the point of injury, and knew that a car from the north might be expected at the time of injury, and that cars ordinarily were run at a fairly good speed. At the time of injury the car which struck plaintiff was running at a much higher rate of speed than ordinarily. Plaintiff testified that

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the car from which he alighted had gone four or five feet north when he reached the east rail of the north-bound track, and that when he reached the west rail it had gone about ten or fifteen feet; that until just as he was struck he did not look to the north at any time for an approaching car after he looked just as he alighted from the east side of the car, and that about the instant he saw the south-bound car he was struck; and, further, that when he was between the tracks he could tell that the headlight on the approaching car was burning.

So it appears from the uncontradicted evidence that until he was struck plaintiff did not look for an approaching car at any time after he first looked immediately upon alighting and when a short step east of the rear platform. Obviously at this time the car from which he alighted so obstructed the view that he could not see the south-bound car upon the west track, although it is clear from the evidence that, had he stepped back two steps, he could have seen it. The view being obstructed until he passed the west rail of the east track, he was bound as soon as the view became unobstructed to look before he entered the path of danger. Had he looked after he crossed the west rail of the north-bound track and while out of danger he could have seen the approaching car at a distance of about half a mile. This was ample opportunity and he should have availed himself of it, especially since the view was obstructed from the time he alighted until he crossed the west rail of the east track. In *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 464, 82 N. W. 295, this court said:

"If, during any part of his course, the track is obscured from his vision, the duty is all the more imperative to avail himself of every possible unobscured opportunity, and, if partial obstruction to vision or hearing exist, to make effort to overcome such obstruction. Omission of any reasonable effort likely to be effective is negligence as matter of law; not merely is it evidence of negligence."

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Plaintiff testified that about the instant he saw the car he was struck. The failure to look in time to avoid being struck when he had opportunity to do so, and when he knew that a car was likely to pass at a fairly good rate of speed at any time, was negligence. *Dummer v. Milwaukee E. R. & L. Co.* 108 Wis. 589, 84 N. W. 853.

"Due care in approaching a railway track can be satisfied only by full use of the senses of sight and hearing at the last moment of opportunity before passing the line between safety and peril." *Goldman v. Milwaukee E. R. & L. Co.* 123 Wis. 168, 170, 101 N. W. 384; *Marshall v. G. B. & W. R. Co.* 125 Wis. 96, 103 N. W. 249; *White v. C. & N. W. R. Co.* 102 Wis. 489, 78 N. W. 585; *Guhl v. Whitcomb,* 109 Wis. 69, 85 N. W. 142; *Schroeder v. Wis. Cent. R. Co.* 117 Wis. 33, 93 N. W. 837.

We are cited by counsel for appellant to the rule that the proof of contributory negligence must be so clear and decisive as to leave no room for unbiased and impartial minds to come to any other conclusion than that plaintiff was guilty of contributory negligence. We are mindful of the rule, and have given it due weight in this case. In connection with this rule it may be observed that due weight should also be given to the decision of the trial court on the question of the sufficiency of the evidence. *Clifford v. M., St. P. & S. S. M. R. Co.* 105 Wis. 618, 81 N. W. 143; *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573. We have been cited to several cases outside of this state by counsel for both parties, but we think the case before us is ruled by decisions of this court, and consideration of other authorities is unnecessary.

We are of opinion that the plaintiff was guilty of contributory negligence as a matter of law, and the judgment below must be affirmed.

By the Court.—The judgment of the court below is affirmed.

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LUEFT and wife, Respondents, vs. LUEFT, by guardian *ad litem*, Appellant.

October 11—November 7, 1906.

Wills: Construction: Trustees: Power to sell and convey land: Authority to mortgage: Infants: Authorizing mortgage of future interests in land: Application of proceeds.

1. Where power given by a will to sell and convey land is coupled with charges upon the estate and the executors are intrusted with its management to carry out and discharge such obligations, the extent of the power conferred (and whether it includes the power to mortgage the land) is to be ascertained from the intention of the testator as evinced by the will in the light of surrounding circumstances.
2. A will gave the residue of testator's estate, after a bequest of $20,000, to the executors in trust "to hold, manage, invest," etc., and "to lease, sell, deliver, transfer, grant, and convey the whole or any part thereof; to invest and reinvest the proceeds of sale, and generally to have, manage, and control" the estate as fully as the testator might do if living. The net income was to be used to maintain and care for his son W., and upon the death of W. without issue the trustees were to convey all real estate to testator's son P. for life, with remainder to his lawful issue. The income of the real estate so held in trust was sufficient only to pay taxes, insurance, and repairs, but the trustees, with moneys obtained by mortgaging the land, improved it so that it yielded a net income for the care and maintenance of the son W. *Held*, that the giving of such mortgage was within the powers conferred by the will.
3. After the death of W. without issue, there being no available means for payment of the mortgage, it was proper for the court, under ch. 300, Laws of 1899, in order to protect the interest of an infant daughter of the son P., to authorize another mortgage to pay off the first.
4. It was proper also in such case for the court, in order to protect the infant's interest, to direct payment of delinquent taxes on the land out of the money raised by the second mortgage, notwithstanding the duty of the life tenant to pay such taxes.
5. The fact that executors had exceeded their trust in applying more than the net income to the support of W. was not material in the proceeding to authorize the giving of the second mortgage.

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APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an appeal from an order of the circuit court authorizing a referee to mortgage lands in which a minor has an interest under a will. On February 17, 1895, Phillip Lueft, a resident of Milwaukee, died testate. His will was admitted to probate April 5, 1895. The executors named in the will duly qualified and letters testamentary issued to them, and they continued to act as executors and trustees during the continuance of the trust under the will. The will of Phillip Lueft, deceased, gave $20,000 out of his personal estate to his son *Phillip Lueft, Jr.,* and then provided as follows:

"All the rest and residue of my estate, real or personal, and wherever situate at the time of my death, I give, devise, and bequeath to my said executors, in trust, however, for the following purposes, to wit: to hold, manage, invest, and reinvest the same, collect the rents, profits, and income arising therefrom; to make all necessary repairs, and pay the taxes, assessments, and insurance thereon; to lease, sell, deliver, transfer, grant, and convey the whole or any part thereof; to invest and reinvest the proceeds of sale, and generally to have, manage, and control my said estate as fully as I might, if living, do myself; all subject, however, to the provisions, conditions, limitations, and restrictions hereinafter contained.

"(A) I direct that during the continuance of this trust my said executors and trustees shall use the net income arising from the estate hereby devised and bequeathed to them as aforesaid, or so much of said income as may be necessary therefor, for the purpose of properly caring for and maintaining my son William Lueft, and his family, if any; it being my intention that my said son shall, in so far as said net income shall suffice, be maintained in the manner we have heretofore lived, and receive all necessary care, assistance, and comforts.

"(B) All personal property herein bequeathed to my said executors and trustees shall be invested, kept invested, and reinvested by my said executors and trustees in good interest-

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bearing securities, secured by first mortgage on real estate situate in the city of Milwaukee, county of Milwaukee, and state of Wisconsin.

"(C) In case my said executors and trustees shall sell any of the real estate hereinbefore devised to them, I direct that the proceeds of such sale or sales shall be invested, kept invested, and reinvested by my said executors and trustees in good interest-bearing securities secured by first mortgage on real estate situate in the said city of Milwaukee; for the purposes of this will the proceeds of such sales shall be deemed real estate and shall be disposed of by my executors and trustees in the manner hereinafter provided for the disposal of my real estate.

"(D) This trust shall terminate on the death of my said son William Lueft. In the event that on the termination of this trust my said son William Lueft shall leave him surviving lawful issue, I will and direct that my said trustees shall convey and pay over all the estate then in their hands to such lawful issue forever."

The will provided further that if this son, William Lueft, should leave no lawful issue, then the executors were to convey and dispose of the estate in their hands as follows: (a) To transfer to his son *Phillip Lueft, Jr.,* all personalty in hand absolutely, and to convey to him all real estate for life with remainder in fee to his lawful issue surviving him, and if he should die leaving no lawful issue then to testator's legal heirs; (b) if the son *Phillip Lueft, Jr.,* should not then be living, to transfer the property to his lawful heirs; and (c) if he should leave no lawful issue then they were to transfer the estate in their hands to testator's legal heirs. At the time of testator's death his son William was insane, and had been in an asylum for the insane for some seven or eight years. He died September 7, 1901, unmarried, and leaving no issue. The son *Phillip* is married, and at the time of William's death had, and still has, one child, a daughter, *Flora Annie,* who is a minor. She appears by guardian and prosecutes this appeal.

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Testator's estate at the time of his death consisted of personal property amounting to $26,474, and two pieces of real estate—one piece situated on Twelfth street, appraised at $8,500, and another situated on Wells street, appraised at $5,000. The Twelfth-street property consisted of a lot and a half, upon which was located an old brick structure. About five years after testator's death the executors, by moving the old structure to the rear of the lot and by constructing a new flat building on it, made improvements on the Twelfth-street property at a cost of about $36,000, which was paid by applying the legacy to *Phillip Lueft, Jr.,* amounting to $20,000, by using $1,000 of cash on hand belonging to the residue of the estate, and by applying $15,000 raised by a loan on September 18, 1901, by the executors and trustees under the will, payment thereof being secured by a mortgage on the real estate so improved. They also expended $1,500 in improvements on the Wells-street property, putting it in proper condition for letting. This action of the executors is alleged to have been taken under the powers of the will, and for the purpose of increasing the income, which was insufficient to pay taxes, assessments, necessary repairs, expenses for the maintenance of the property, and the support, as directed by the will, of the son William.

On March 30, 1903, *Phillip Lueft, Jr.,* and his wife, under ch. 300, Laws of 1899, petitioned the circuit court to authorize a mortgage of $18,000 on this real estate, the avails of such mortgage to be applied in payment of the $15,000 mortgage given by the executors and trustees and interest due thereon, and to pay the unpaid taxes on the real estate for the years 1900, 1901, and 1902. Notice of such application was given to appellant and her guardian *ad litem.*

The petition set forth substantially the foregoing facts, and further alleged that the executors, as directed by the will, had supported the son William in an asylum for the insane until the time of his death; that the income from the real es-

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tate as so improved was insufficient to so maintain him and pay the expense of administration, the debts, taxes, assessments, and improvements on the real estate; that there was no money of the estate on hand to pay the mortgage when due, and that there were taxes unpaid on the estate for the years 1900, 1901, and 1902; that a mortgage loan of $18,000 on the property would well promote the interests of the daughter, *Flora Annie,* prevent the probable foreclosure of the mortgage, pay the former loan of $15,000 with interest, and by redemption of the outstanding tax certificates prevent the issuance of tax deeds on the premises.

The court, after a hearing and a reference respecting the application, made an order, based on this petition, in which it found

"that the interests of said *Flora Annie Lueft,* and of any after-born children of said *Phillip Lueft, Jr.,* who will also own and become interested in said real estate under and by said last will and testament of said Phillip Lueft, deceased, require and will be substantially promoted by the mortgaging of the real estate mentioned in said petition and hereinafter described for the sum of eighteen thousand ($18,000) dollars, for the reasons set forth in said petition,"

authorized the execution of a mortgage, and directed the application of the money so borrowed in discharge of the former mortgage and interest due on it and the payment of unpaid taxes. From such order *Flora Annie Lueft,* by her guardian *ad litem,* appeals.

For the appellant there was a brief by *F. H. Bottum,* guardian *ad litem,* and *Ryan, Ogden & Bottum,* of counsel, and oral argument by *L. M. Ogden.* To the point that the executors had no power to mortgage the land they cited *First Nat. Bank v. Nat. Broadway Bank,* 156 N. Y. 459; *Potter v. Hodgman,* 81 App. Div. 233; *Willis v. Smith,* 66 Tex. 31; *Patapsco G. Co. v. Morrison,* 2 Woods, 395; *Greene v. Greene,* 19 R. I. 619; *Hannah v. Carnahan,* 65 Mich. 601; *Rutherford L. & I. Co. v. Sanntrock,* 44 Atl. 938 (see 60

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N. J. Eq. 471); *Wilson v. Maryland L. Ins. Co.* 60 Md. 150; *Rountree v. Denson,* 59 Wis. 522.

For the respondents there was a brief by *Austin, Fehr & Gehrz,* representing the mortgagee and his assignee, and of counsel with *Emil Wallber,* attorney for petitioners; and oral argument by *G. A. Gehrz.* They argued, among other things, that the language of the will should be construed as giving the executors and trustees power to improve the real estate and mortgage the same to enable them to complete and pay for such improvements. *Lardner v. Williams,* 98 Wis. 514; *Hannah v. Carnahan,* 65 Mich. 601; *Price v. Courtney,* 87 Mo. 387; *Kent v. Morrison,* 153 Mass. 137; *Zane v. Kennedy,* 73 Pa. St. 182; *Leggett v. Firth,* 53 Hun, 152, 156; *Steifel v. Clark,* 9 Baxt. 466, 470, 471; 4 Kent, Comm. 147; *Mills v. Banks,* 3 P. Wms. 1, 9; *Jackson v. Everett,* 3 Shannon (Tenn.) 811, 58 S. W. 340; *Williams v. Woodard,* 2 Wend. 487, 492; 11 Am. & Eng. Ency. of Law (2d ed.) 1060, 1061; 22 Am. & Eng. Ency. of Law (2d ed.) 1156; *Loebenthal v. Raleigh,* 36 N. J. Eq. 169, 173.

SIEBECKER, J. Under the provisions of the will it is unquestioned that the executors took the residue of the estate for the purpose of applying the net income thereof, if necessary, to the care and maintenance, during his life, of testator's son William, and of his family, if he had any. In their administration of the trust, for the purposes and in the manner set out in the statement of facts, they mortgaged the real estate for $15,000 to pay in part for the improvements made on it. The inquiry is whether the executors had power so to mortgage the real estate under the powers conferred by the will. The chief difficulty arises in determining whether the power to make disposition of the real estate, given in the will, included the power to mortgage it for the purposes of administering the trust with respect to the care and maintenance of the son William. The decisions on the subject of

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the right of trustees to mortgage real estate under a simple power of sale are not harmonious. *Lardner v. Williams,* 98 Wis. 514, 74 N. W. 346. The weight of authority seems to be that a mere power to sell, such as that of a power of attorney to sell real estate, confers no power to mortgage. 1 Jones, Mortg. § 129, and cases cited; 2 Washburn, Real Prop. § 1690, and note. But when such powers, coupled with charges upon the estate, are conferred by wills or other instruments, and the executors are intrusted with its management to carry out and discharge such obligations, no such limitation is implied. Under such circumstances the extent of the power conferred by such words as "to sell," "convey," and their equivalents is to be ascertained from the intention of the donor of the power in the light of the purposes and objects of the trust as expressed in the grant.

In the construction of powers conferred for such objects we again find the decisions upon the subject irreconcilable. Some of the courts have adopted the strict construction, and hold that no power to mortgage is implied by the language granting power to sell, convey, and dispose of the real estate, for the reason that such terms negative an intent of the donor to authorize mortgaging the estate. Of this class are the following cases: *Bloomer v. Waldron,* 3 Hill, 361; *Potter v. Hodgman,* 81 App. Div. 233; *Price v. Courtney,* 87 Mo. 387; *Parkhurst v. Trumbull,* 130 Mich. 408, 90 N. W. 25; *Greene v. Greene,* 19 R. I. 619, 35 Atl. 1042. Other courts adopt a liberal interpretation of such terms when employed in granting such powers, and have construed them as expressly including the authority to mortgage. This rule is followed in Pennsylvania and other jurisdictions. *Zane v. Kennedy,* 73 Pa. St. 182; *McCreary v. Bomberger,* 151 Pa. St. 323, 24 Atl. 1066; *Jackson v. Everett,* 3 Tenn. Cas. 811; *Steifel v. Clark,* 9 Baxt. 466; *Rutherford L. & I. Co. v. Sanntrock,* 60 N. J. Eq. 471, 46 Atl. 648; *Mills v. Banks,* 3 P. Wms. 1; *Ball v. Harris,* 4 Myl. & C. 264; 4 Kent, Comm. 345.

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This court in the case of *Lardner v. Williams,* 98 Wis. 514, treating of the question here involved, adopted the rule followed in many jurisdictions of looking into the instrument creating the trust and of giving effect to the manifest intent of the donor as shown by the light of the surrounding circumstances. The principle of this rule is that if the purpose of the trust can be answered and best accomplished by mortgaging the estate, and if this is not in violation of the intention of the donor, then this method of administration is proper and within the grant of the power. Such construction was followed in *Starr v. Moulton,* 97 Ill. 525; *Faulk v. Dashiell,* 62 Tex. 642; *Loebenthal v. Raleigh,* 36 N. J. Eq. 169; *Waterman v. Baldwin,* 68 Iowa, 255, 26 N. W. 435; *Kent v. Morrison,* 153 Mass. 137, 26 N. E. 427. See, also, 4 Kent, Comm. 345, and cases cited; 1 Perry, Trusts (5th ed.) § 768.

The will clearly declares the object of the trust conferred on the executors. They were to employ the residue of the estate transferred to them so that his son William should be cared for and maintained in the manner in which he had theretofore received "all necessary care, assistance, and comforts," and the cost thereof was to be defrayed out of the net income of the estate. To accomplish this purpose the executors were vested with the residue of the estate, after a bequest of $20,000 out of the personal estate to his son *Phillip,*

"to hold, manage, invest, and reinvest the same, collect the rents, profits, and income arising therefrom; to make all necessary repairs, and pay the taxes, assessments, and insurance thereon; to lease, sell, deliver, transfer, grant, and convey the whole or any part thereof; to invest and reinvest the proceeds of sale, and generally to have, manage, and control my said estate as fully as I might, if living, do myself."

In its terms and phraseology this language is significant, showing that the testator intended to confer on the executors all necessary authority under the power to manage the property throughout William's life so as to provide for him as the testator had done in his lifetime. It is evident that he in-

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tended to invest them with broad and discretionary powers in the control and management of the property and in the conduct of William's affairs for his benefit. The terminology necessarily implies that the executors were to handle the property in such ways as they found best under the circumstances to meet the charge imposed by the will. The terms of the will and the directions it imposed negative the idea that the executors were to be limited to an absolute sale of the real estate and to reinvesting the proceeds in interest-bearing securities. Testator manifestly contemplated that they should secure the largest possible income from the estate. The accomplishment of such an object implies that they were vested with a discretion to adopt such management as they, in their judgment, found would best attain the desired result. No portion of the will indicates an intention to restrict this authority by limiting the management and the disposition of the property to any specific method.

We should look to all parts of the will to ascertain the testator's intention. Taking this view of the will, we think the language, "generally to have, manage, and control my said estate as fully as I might, if living, do myself," is an expression of testator's intention to confer broad and comprehensive powers for the purposes of this trust, and that such language should be construed as having a significance inclusive of every meaning in which the words may be used, instead of a restricted one. It appears that the real estate held in trust yielded no income above the necessary expenses of repairs, taxes, and insurance. After it was improved, as shown, it yielded a net income sufficient to furnish the son William the care and maintenance directed and the executors were thus enabled to accomplish the purposes of the trust. In the light of these facts it seems obvious that the provisions of the will were complied with by the executors in making the improvements and that their administration was in harmony with testator's intention that the powers granted them should

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be co-extensive with the purposes of the trust, and included those required to carry out the improvements of the real estate, and for this purpose they had authority to execute the mortgage for $15,000. This mortgage being valid, and there being no means of payment available, it seems obvious that the only way to protect the infant's interest and to prevent a sale of the premises in satisfaction of this mortgage is to authorize another loan to secure money to pay it. Such a course is promotive, within the contemplation of ch. 300, Laws of 1899, of her interests in the property.

It is suggested that the court erred in directing that the delinquent taxes be paid out of the money so to be raised in this proceeding, because the law imposes the duty of paying them on the life tenant. Notwithstanding such duty of the life tenant, the court may very properly direct redemption from a sale for delinquent taxes to prevent the issuance of tax deeds, thereby protecting the infant's estate. A delay of redemption until payment could be enforced against the life tenant might seriously imperil the infant's interests.

It is urged that the executors exceeded their trust in applying more than the net income to William's support. Whether or not there is a basis for such a claim is immaterial in this proceeding. The executors had power under the will to make the $15,000 mortgage, and it was proper for the court to order a new loan to provide for its payment to protect the infant's estate from loss as threatened if it were not paid.

We discover no error in the record, and find that the order of the circuit court was well founded.

By the Court.—The order appealed from is affirmed.

CASSODAY, C. J., dissents.

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GERMANIA NATIONAL BANK OF MILWAUKEE, Respondent, vs. MARINER, imp., Appellant.

October 12—November 7, 1906.

Bills and notes: Ambiguity as to signature: Officer of corporation: Statutes construed: Parol evidence.

A note read: "Four months after date the Northwestern Straw Works promise to pay," etc., and was signed

"The Northwestern Straw Works,
"E. R. Stillman, Treas.
"John W. Mariner."

Mariner was the secretary of the corporation, duly authorized to sign the note on its behalf. *Held:*

1. The signature of Mariner was not "so placed" on the instrument as to make it doubtful in what capacity he intended to sign, within the meaning of subd. 6, sec. 1675—17, of the Negotiable Instrument Law (ch. 356, Laws of 1899), providing that a person whose signature is so placed is to be deemed an indorser.

2. It appearing from the instrument itself that Mariner placed his signature thereon as maker, either individually or in a representative capacity, sec. 1677—3 does not apply.

[3. Whether the note itself showed that Mariner signed on behalf of the corporation and is therefore not personally liable thereon, under sec. 1675—20, not determined.]

4. If sec. 1675—20 does not apply, the note was ambiguous upon its face as to Mariner, and parol evidence that he signed merely in his representative capacity and as agent for the corporation was admissible, even as against a *bona fide* purchaser of the note for value before its maturity.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Van Dyke & Van Dyke,* and oral argument by *G. D. Van Dyke.*

For the respondent there was a brief by *Austin, Fehr & Gehrz,* and oral argument by *W. H. Austin.*

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WINSLOW, J. The plaintiff sued the appellant and the Northwestern Straw Works as makers of the following promissory note:

"Milwaukee, January 6, 1905.

"Four months after date the Northwestern Straw Works promise to pay to the order of F. G. Bigelow ($20,000) Twenty Thousand Dollars at the First National Bank, Milwaukee. Value received.

"The Northwestern Straw Works,
"E. R. Stillman, Treas.
"John W. Mariner."

The defendants answered jointly, alleging that the note was the note of the Northwestern Straw Works (a corporation) alone, and was signed by *Mr. Mariner* as secretary of the corporation and not in his individual capacity. The case was tried without a jury, and the evidence showed without dispute that the plaintiff purchased the note from the payee in due course and for value before due; that it represented a loan made to the corporation defendant alone; that the by-laws of the corporation required its notes to be signed by two officers, either the president or treasurer and the secretary; that Mr. Stillman was the treasurer of the corporation and *Mr. Mariner* the secretary; that *Mr. Mariner* signed his name thereto simply for the purpose of making it the note of the corporation and not intending to bind himself, but neglected to add the word "Secretary" to his name; that the plaintiff had no information as to the capacity in which *Mr. Mariner* signed the note further than that afforded by the note itself; and that the defendant corporation went into bankruptcy after the maturity of the note and made a composition with its creditors under which there was paid to the plaintiff on the note $4,020. There was no proof that the corporation had ever held out to the plaintiff or the public that Mr. Stillman or any single officer had authority to execute notes for it. Upon these facts the court, upon motion,

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ordered the complaint amended so as to charge *Mr. Mariner* as indorser, found him liable as such, and entered judgment against him for the balance due upon the note, from which judgment *Mr. Mariner* appeals.

The question as to the liability of *Mr. Mariner* under the facts stated is certainly not free from difficulty. The general rule is well supported that when it clearly appears, either in the body of the note or by appropriate words added to the signatures themselves, that a corporation is the party making the promise, there is no individual liability on the part of the signers. 1 Randolph, Comm. Paper (2d ed.) § 135. In an early case in this state, however (*Dennison v. Austin,* 15 Wis. 334), this principle was in effect modified, as it is modified in some other jurisdictions, by a proviso to the effect that, if the signers in fact had no authority to bind the corporation, they bind themselves individually. The Negotiable Instrument Law (ch. 356, Laws of 1899) recognizes both the general principle and the proviso, in sec. 1675—20, in these words:

"Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument *if he was duly authorized.*"

As it appears without dispute in the present case that the signers of the note were authorized to execute it on behalf of the corporation the proviso need not be considered. In the present case the body of the note declares that the "Northwestern Straw Works" (presumably a corporation) is the promisor. It does not say "I" or "we" promise to pay, but specifically names a corporation as the promisor. Hence, so far as Mr. Stillman is concerned, the note itself makes it clear that he signed only on behalf of the corporation. Parol evidence would not be admissible to show that he signed as a joint maker. *Liebscher v. Kraus,* 74 Wis. 387, 43 N. W. 166. The same claim is forcibly made as to the signature

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of the defendant *Mariner,* and it is not without authority to support it. *Shaver v. Ocean M. Co.* 21 Cal. 45.

We are not inclined, however, to rest the case upon any doubtful proposition. Granting that the section does not apply as to the signature of *Mr. Mariner,* we think it would be conceded that upon its face it is ambiguous so far as *Mr. Mariner* is concerned. The instrument says that the "Northwestern Straw Works" promises to pay. The signature of *Mr. Mariner* is the bare signature of an individual. This is certainly not usual, and should arrest the attention of any one dealing with it at once. People do not ordinarily sign contracts purporting on their face to be contracts of others. If they do, the fact itself suggests at once a doubt as to what they mean by it. In other words, the instrument becomes, as to such signatures, ambiguous. The Negotiable Instrument Law, before referred to, contains several provisions with reference to the construction of negotiable instruments bearing the signatures of persons who have not made their intentions clear, and these must be considered. Subd. 6, sec. 1675—17, provides that, "where a signature *is so placed* on an instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser." ⌈This provision, by its very terms, applies only to a case of doubt arising out of the location of the signature upon the instrument. Names are sometimes placed at the side, on the end, or across the face of the instrument, and thus a doubt arises as to whether the signer intended to be bound as a maker or an indorser, or perhaps as a guarantor, and to solve these doubts the section in question was evidently framed. It was to settle a doubt fairly arising from the ambiguous location of the name, and applies to no other. In the present case there is no doubt of this nature. The signature of *Mr. Mariner* is placed in the usual and proper, in fact the only proper, place for a maker. The doubt arising is not a doubt whether he intended to sign as maker, in-

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dorser, or guarantor, for it is clear from the location of the name that he did not intend to sign as indorser or guarantor, but simply a doubt whether he intended to sign in an individual or in a representative capacity as maker. To say that, where it conclusively appears from the instrument that the signer intended to sign as a maker, the statute is intended to make him an indorser, would be little short of ridiculous. The statute was passed to meet a case where it is doubtful from the instrument whether a man intended to become an indorser, not to make an indorser out of a person who, without doubt, intended to sign as maker, either individually or as representative of another. We have no doubt, therefore, that this section has no application to the present case.

Secs. 1677—3 and 1677—4 (ch. 356, Laws of 1899) are also referred to as having some bearing on the question. Sec. 1677—3 provides that "a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Sec. 1677—4 provides that "where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as an indorser in accordance with the following rules," etc. As to the last-named section, it is manifest that it has no application, because *Mr. Mariner* did not place his signature upon the note in blank. The first-named section is equally inapplicable, because it is certain, from the instrument itself, that he placed his signature thereon as maker, either individually or in a representative capacity; hence the contingency named in the section has not arisen. It seems entirely clear from the language of these two sections, and from the notes thereto, that they were intended to lay down in statutory form the propositions already decided by this court in *Cady v. Shepard,* 12 Wis. 639, and *King v. Ritchie,* 18 Wis. 554, and other cases following them. There are no other sections of

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the Negotiable Instrument Law which can be reasonably claimed to have any material bearing on the question now under consideration, and it must therefore be determined upon general principles of the common law.

It is elementary that, in case a written contract is ambiguous in its terms, parol proof of the facts and circumstances under which it was executed may be introduced to aid in its construction. This rule applies to commercial paper, even in the hands of third persons, because, where the ambiguity is apparent to a reasonably prudent man on the face of the paper, he is necessarily put upon inquiry. Mechem, Agency, § 443; *Hood v. Hallenbeck,* 7 Hun, 362; 10 Cyc. 1051; 4 Thompson, Corp. § 5141. The parol evidence in the present case showed without dispute that *Mr. Mariner's* signature was attached simply in his representative capacity and as agent of the corporation. There being a plain ambiguity in this respect appearing on the face of the note, the evidence was properly received, and the judgment against *Mr. Mariner* individually was erroneously rendered.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the complaint.

KREMER and others, Executors, Respondents, vs. SPONHOLZ and wife, Appellants.

October 12—November 7, 1906.

Judgment by default: Vacating: Claim of defendant must appear meritorious: Proofs.

1. Upon a motion to vacate a default judgment and permit a defense to be interposed it is essential that it should appear, from the proposed answer and the whole case made, that the claim of the defendant is meritorious.

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2. The truth of the allegations of the proposed answer in such a case may properly be tested by the proofs produced on the motion, to the extent of determining whether, in any reasonable probability, the claim of the defendant can be established on a trial; and if there is no such probability the answer, though meritorious in mere words, may be condemned as unmeritorious in fact.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

This is an appeal from an order refusing to open a default judgment and permit a defense to be interposed.

The defendants in 1892 borrowed $7,375.15 in one sum and $650 in another, giving their promissory notes therefor and securing each by a mortgage on real estate occupied by them for some years prior to the foreclosure proceedings hereafter mentioned. Valentin Blatz acquired said securities and subsequently died. Some two years thereafter and in February, 1896, the circumstances being such that the mortgages were subject to foreclosure, an action was commenced to that end by the executors of the last will and testament of said Blatz, the summons being personally served, as indicated by the record, by a person not an officer. Such proceedings were thereafter had in such action that in March, 1896, a judgment of foreclosure and sale, and providing in case of a deficiency for a personal judgment against the defendants, was rendered, the amount of the claim against defendants being adjudged to be $8,562.82. Later and in due time such proceedings were had to enforce said judgment that the mortgaged property was sold at public sale to the plaintiffs for $6,500, they making but one and the only bid at the sale. On May 15, 1897, thereafter judgment for deficiency was in due form rendered against the defendants for $2,688.48. No notice of the entry of the judgment was given to said defendants. In March, 1905, finding their property, upon which they desired to obtain a loan, to be incumbered by such last-mentioned judgment, they moved the court to vacate the foreclosure pro-

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ceedings upon the ground that the summons was never served upon them. The motion was heard on affidavits and denied and the order was not appealed from. A motion was thereafter made to set aside the foreclosure judgment and for permission to defend. Such motion was heard on a proposed answer, affidavits, and oral testimony. In such answer, for a defense, there were allegations to this effect: An agreement was made between the said Valentin Blatz and the defendants that in consideration of a surrender of the mortgaged property without costs to him and without foreclosure proceedings, and payment of an indebtedness of defendant *Emil A. Sponholz,* which he owed for beer, defendants might remain in possession of the premises till their new house was done, which was in process of being erected, and that no further claim should be made on the mortgage indebtedness, but that the notes and mortgages should be surrendered up and canceled and the mortgages discharged of record, and that pursuant to such agreement the indebtedness for beer was paid and the property was surrendered. Defendants have always been ready and willing by a proper conveyance to vest the title to the mortgaged property in said Blatz, or his legal representatives or assigns. At the time of the foreclosure sale the property was worth $13,000, and was worth at the time of making the answer a sum in excess of the mortgage indebtedness and costs, and was of the rental value of $600 per year.

The affidavits used on the motion placed the value of the property at the time of the foreclosure sale at from something less than the amount due on the foreclosure judgment to several thousand dollars in excess thereof. Some of them tended to show that the value was greater at the time of the commencement of this proceeding than at the time of such sale. There was oral testimony by the defendant *Emil A. Sponholz* to the effect that the new house spoken of in the complaint was in process of erection in 1897 at the time of the foreclosure

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sale; that he did not know anything about the foreclosure judgment or the judgment for deficiency till March, 1905; that knowledge thereof came to him as stated in the proposed answer; that he moved out of the mortgaged premises pursuant to a mutual understanding with a Mr. Fricke, agent for the plaintiffs, that he should surrender the same but should be permitted to stay until the house should be finished; that it was not because of any judgment that he surrendered the property; that he knew of none. Both defendants testified that no summons was served on them in the foreclosure suit.

There was testimony in opposition to the motion that on January 31, 1896, a letter was in due course sent to the defendant *Emil A. Sponholz* on behalf of plaintiffs to the effect that the former's proposition to turn over the mortgaged property in settlement of the mortgage indebtedness would not be accepted and that foreclosure proceedings would be commenced. Mr. Fricke testified that, representing the plaintiffs, after the foreclosure judgment was rendered he interviewed *Mr. Sponholz* about redeeming the property, and that the latter said he could not redeem. Mr. Fricke further testified that after the mortgage sale he called on *Mr. Sponholz* in respect to delivering up the property and that the latter said that he wished to remain till his new house was done; that on such occasion *Mr. Sponholz* was informed of the sale and that the plaintiffs were the purchasers. Mr. Fricke further testified that there was a large crowd at the sale, but that the only bid was that of the plaintiffs for $6,500; that he understood from *Mr. Sponholz* that the new house was the property of his wife and that he, *Sponholz,* was execution proof; that when he had the talk with *Sponholz* after the sale about surrendering up the property *Sponholz* was keeping a saloon thereon. *Sponholz* denied having the conversation with Mr. Fricke, testified to by him, and denied that he was keeping a saloon at the time of the alleged conversation.

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The motion of the defendants was denied and they appealed.

C. H. Hamilton, for the appellants.

For the respondents there was a brief by *A. C. Rietbrock,* attorney, and *George Sylvester,* of counsel, and oral argument by *Mr. Sylvester.*

MARSHALL, J. The appellants' application was addressed to the sound discretion of the court and, therefore, the result cannot be successfully attacked except for abuse of such discretion. That is elementary. True, as counsel for appellants contends, that rule contemplates the exercise of legal discretion,—that is that the trial judge shall exercise sound judgment upon the facts and circumstances of the case, recognizing the spirit of the Code that every person having within reasonable probabilities, apparently, a meritorious cause of action or defense shall have an opportunity to present the same for adjudication, if he acts within the time limited by the statute, notwithstanding any neglect which is reasonably excusable, on such terms as will fairly make the opposite party good for the disturbance of his situation by the mere reason of delay.

One of the most important essentials in an application of this sort is that the claim of the petitioner shall appear, from the allegations in the proposed answer and from the whole case made, to be meritorious. *Union L. Co. v. Chippewa Co.* 47 Wis. 245, 2 N. W. 281; *Port Huron E. & T. Co. v. Clements,* 113 Wis. 249, 255, 89 N. W. 160. The appellants at the outset faced an adjudication of the court, unappealed from, that the summons was regularly served on them and that their sworn statements to the contrary were untrue. The trial court in view of that situation was well warranted in concluding that their claim as to an agreement having been made that the property should be surrendered and an indebt-

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edness for beer paid in satisfaction of the mortgage indebtedness should have some fair support in order to raise a probability that it could be established upon a trial. It conclusively appears that the allegations of the answer as to an agreement having been made with Valentin Blatz are untrue, because his death occurred two years prior to the happening of the circumstances which it is conceded characterized such agreement, if any was ever made. Blatz died before the foreclosure action was commenced and before appellants commenced to construct the new house to which they removed when they vacated the mortgaged premises. So the claim that they agreed with Blatz during the period of the construction of the new house, as claimed, cannot be true. Again the idea that the appellants vacated the premises under an agreement, as they claim, making no conveyance to the holders of the mortgages in execution thereof, and that appellants nevertheless supposed respondents, for the period of some eight years which followed before the motion to open the foreclosure judgment was made, exercised control over the property as owners without any title other than a mere mortgage interest, is so very unreasonable that the court was warranted in disbelieving it. Further, since when *Mr. Sponholz* came to testify orally in respect to the matter he made no mention of having made an agreement with Mr. Blatz, but claimed to have had some sort of an understanding with Mr. Fricke, as agent of respondents, as to vacating the premises, differing materially from the agreement alleged in the answer, that warranted the court, especially in view of the testimony of Mr. Fricke, in concluding that no agreement was made of the nature of that claimed by appellants. In the answer, as we have seen, it was alleged that defendants agreed to surrender the mortgaged premises and *Mr. Sponholz* agreed to pay an indebtedness of his for beer in discharge of the mortgage indebtedness, while, when he came to testify orally, he said nothing whatever of a definite nature as to payment of the beer bill. He merely said

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that "there was a mutual understanding between Mr. Fricke and myself. I told him I was willing to vacate the property and turn it over without any law proceedings, and he said it was nice, and he gave me a promise to stay in there until my house was finished. It was not because of a judgment of foreclosure and sale. It was simply because there was a mortgage on the property. . . . There never was any suit."

In view of the fact that there was a suit which had proceeded to judgment long before the date of the alleged understanding and the obvious falsity of the answer as to an agreement having been made with Valentin Blatz, and the highly unreasonable claim that an agreement somewhat similar to that so alleged was made with Mr. Fricke and that respondents took the property pursuant thereto without any conveyance being made to them by appellants, and in face of the much more reasonable claim of respondents, supported by proof, that appellants were notified in writing before the foreclosure suit was commenced that the property would not be taken in discharge of the mortgage indebtedness; that after the sale and sheriff's deed to respondents appellants were told of such judgment and requested to vacate the property, and were then at their request permitted to keep the same for a short time to enable them to finish their house, then in process of construction,—it seems that the trial court had a pretty sound basis for the conclusion that appellants' plea that the mortgaged premises were surrendered in discharge of the mortgage indebtedness could not be established by them to the satisfaction of any court, if a defense of that sort were permitted to be interposed. Certainly the situation falls far short of satisfying the rule that a strong case of abuse of discretion must be shown to warrant reversing the determination of the trial court in such a matter as this. *Seymour v. Chippewa Co.* 40 Wis. 62.

On an application of this sort the truth of the allegations of the proposed answer may properly be tested by the proofs

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produced on the motion, to the extent of determining whether, in any reasonable probability, the claim of the defendant can be established on a trial, and if there is none, such answer, though meritorious in mere words, may be condemned as unmeritorious in fact. That course was pursued here. The proposed answer on its face was meritorious, but the proofs produced on the motion showed that its material allegations could not be established by evidence; and the substitute therefor testified to, viz., the claimed understanding with Mr. Fricke, the trial court evidently concluded was without any substantial support. We cannot see our way clear to disturb that conclusion.

By the Court.—The order is affirmed.

SPELIOPOULOS, Respondent, vs. SCHICK and another, Appellants.

October 12—November 7, 1906.

Contracts: Permission to maintain structure on sidewalk: Prevention by third parties: Recovery: Evidence: Cross-examination: Conduct of attorneys: Instructions to jury.

1. Defendants, being lessees of a store building, gave plaintiff permission to maintain a bootblacking stand on the sidewalk adjoining such building, in consideration of a sum of money then paid and monthly payments thereafter to be made. The agreement expressly stated that defendants did not in any way guarantee to plaintiff the right to keep the premises without molestation on the part of the city or other persons than themselves. *Held*, that if plaintiff was prevented from maintaining the stand by the city, by defendants' landlord, or by any person other than defendants, he was not entitled to recover back the sum paid to defendants.
2. In an action to recover back the sum so paid plaintiff should not have been permitted to introduce in evidence a so-called permit to erect the stand, given by a city official who had no authority over the subject.

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3. Plaintiff in such action having testified on the subject of his intelligent understanding of the situation before making the contract, it was error to exclude, on his cross-examination, a question as to whether before making the contract he had consulted an attorney as to his right to build the stand.
4. In an action upon a contract, attempts by the plaintiff's attorney to show that plaintiff did not fully understand the contract, and to impress that as a fact upon the jury in his argument, are criticised as having been intended to invoke the sympathy of the jury and obscure the legal rights of the parties; but whether such conduct was so prejudicial as to vitiate the verdict is not determined.
5. An instruction carrying the impression to the jury that, in the opinion of the judge, there was evidence from which the jury might find a certain fact, when in reality there was no evidence whatever tending to prove that fact, was misleading and erroneous.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Defendants, being tenants under lease of a store building at the corner of Third street and Grand avenue, in Milwaukee, entered into a written agreement with the plaintiff that, in consideration of $225 then paid and for the further consideration of $25 per month to be paid on the 1st day of each subsequent month, "permission is hereby given by us to *James Speliopoulos* to maintain and conduct a bootblacking stand on the east side of Third street north of Grand avenue alongside of the store building occupied by Schick & Ducey." Further, that it was understood that such permit should continue for two years upon the above terms, and be renewable by plaintiff for further two years at the rate of $30 per month, and further provided that permission was given upon the understanding that should *Speliopoulos* leave or remove his bootblacking stand for any reason whatsoever he forfeits all claim, right, and title to the $225 above mentioned; also, "in permitting said *James Speliopoulos* to conduct said business, the said Schick & Ducey do not in any way whatsoever guarantee said *James Speliopoulos* the right to keep these premises without

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molestation on the part of the city or other persons than themselves." Plaintiff, before the making of the agreement, had obtained a written formal permission to maintain the stand on the sidewalk from the mayor, who had no authority whatever to give it, the board of public works being vested with all such authority, and exhibited same to the defendants. After making of the contract plaintiff employed a carpenter to construct the stand, some twenty feet in length, four feet in width, and brought it to the place where he commenced its erection. He was there interrupted by a policeman, to whom plaintiff exhibited his permit, whereupon, according to the plaintiff's evidence, the policeman said "go ahead," and, according to the policeman's testimony, forbade further proceedings until a proper permit from the board of public works was obtained. The carpenter continued to construct the stand, when it was again forbidden by a wholly unascertained person described as a man who called himself a lawyer. Plaintiff appealed repeatedly to the defendants, and as to their conduct a distinct issue of fact arises, the defendants claiming that they repeatedly said to him that they had nothing to do with other people's objections, they were willing he should proceed and thought he had a perfect right to; plaintiff claiming that, after first so stating, they afterwards told him that he could not build, but must take his stuff and go away. This, after some days, he did, and demanded return of his money, which they refused, and this action was brought to recover his damages from the breach of their agreement. The jury returned a verdict in favor of the plaintiff for $225 "forfeit" and $125 paid to the carpenter. From judgment entered upon such verdict, after motion to set it aside, defendants appeal.

For the appellants there was a brief by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill.*

For the respondent there was a brief by *W. B. Rubin,* and oral argument by *W. C. Zabel.*

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DODGE, J. Obviously the erection and maintenance of a bootblacking stand upon the sidewalk adjoining premises is an invasion of two distinct rights: those of the person lawfully in possession of the premises and those of the public at large in the street. Whether it also infringes upon any rights of the owner of a reversionary title in the premises need not be decided in this case. As each person whose rights are so invaded can object to the erection of such structure, he can also waive such right to object, but merely as to himself. Neither can grant a fully effective privilege to maintain such a structure. Clearly, the written instrument executed by the defendants was a mere permission, a mere agreement not to urge the objections which they might against the plaintiff's erecting and maintaining the stand at the place designated. Such would be quite obviously the effect of the instrument even without the last paragraph, but that puts beyond dispute their purpose to confer no rights upon the plaintiff against any one but themselves, and they could be guilty of no breach of that contract except by raising the objections which they thereby agreed to waive. Further, it is apparent that the $200 paid in advance was in no sense a forfeit or security, but a price paid for the permission given, to which was to be added the monthly instalments of $25 each as further compensation for that same permission. In the light of this construction of the contract, there could be no breach thereof on the defendants' part by reason of the interference with plaintiff's occupancy by any one except themselves or one acting under their authority. There was evidence from which the jury might have found that the defendants did so interfere, hence that question was a legitimate one for the jury. There was also evidence that plaintiff's failure to erect and maintain his stand was due to prevention by a police officer acting as representative of the city, the guardian of the rights of the public in the street. There is also some evidence of interference by

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a somewhat mythical "man" who "called himself a lawyer," to which, so far as the evidence goes, plaintiff need have paid no attention, but for which no responsibility of defendants is shown. In this situation, clearly the only question for the jury to pass upon was, on the one hand: Was plaintiff prevented from maintaining his stand by the defendants? On the other hand: Did he refrain from so doing entirely by reason of the acts of either the city or this supposed lawyer? If the former, he may have been entitled to recover back that which defendants had received from him and to recover such damages as were reasonably to be anticipated from a breach of the contract. If the latter, he had no right to recover against the defendants at all. Two instructions to the jury, which are assigned as error, departed radically from this view. Those instructions were to the effect that if plaintiff was prevented from erecting his stand by either the defendants, the city, or the landlord he would be entitled to recover back the money paid by him; and that if he was prevented either by the defendants or by the landlord, he was entitled to recover from the defendants the sums expended by him in preparation to erect. In both of these instructions, by the reference in the one to the city or the landlord, and in the other to the landlord, fatal error was committed, for which the judgment must be reversed.

The reference to prevention by the landlord was also erroneous upon another ground, namely, that it carried to the jury the impression that there was evidence, in the opinion of the judge, upon which they might find that the landlord had interfered with the plaintiff, while the record is wholly barren of any evidence having such tendency. Such an instruction is misleading and erroneous. *Musbach v. Wis. C. Co.* 108 Wis. 57, 69, 84 N. W. 36.

Certain detail errors are assigned, to which, perhaps, some attention should be given, in view of the fact that a new trial may ensue. Plaintiff was allowed to introduce, over objec-

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tion, a so-called permit from the mayor to erect the stand. It appearing by the charter of Milwaukee that the mayor had no authority whatever over the subject, but that all authority was vested in the board of public works, from whom only, if any one, could a legal permit be issued, it is difficult to see any materiality to this paper. Its prejudice, however, is not so obvious, though it is argued that it was made use of to urge upon the jury the good faith of plaintiff and to arouse sympathy in his behalf. If so, it may be that it was prejudicial. It is always best to exclude evidence that has no relation to the issues on trial, for it is difficult to measure its effect on such false issues as that above suggested. The paper should have been excluded.

We can see no reason for excluding a question asked of the plaintiff on cross-examination, whether before making the contract he consulted an attorney as to his right to build the stand. He had testified on the subject of his intelligent understanding of the situation before making the contract, and this question was entirely in line with the evidence so given.

Complaint is made because plaintiff's attorney attempted to show an imperfect understanding by the plaintiff of the contract, and undertook to impress that as a fact upon the jury in his argument. The court, however, at every step overruled him in such attempts, hence no technical error on the part of the court was committed, and, since the judgment must be reversed on other grounds, we need not consider whether such prejudice could have resulted from the conduct of the plaintiff's attorney as to vitiate the verdict. We are moved to say, however, that, as plaintiff was suing upon the contract, the fact of incomplete understanding thereof could have been offered for no reason but with a view to invoke sympathy from the jury, which would have been an entirely false issue, and, if effective at all, would but have tended to obscure the legal rights of the parties, which are wholly independent of it. No counsel, bound by his oath as he should be by his

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conscience to the promotion of justice according to law, ought to permit himself to so obstruct or obscure it, even in the fervor of a jury trial.

None of the other assignments of error are of sufficient gravity to warrant discussion.

By the Court.—Judgment reversed, and cause remanded for new trial.

STATE EX REL. SEPIC, Respondent, vs. CITY OF MILWAUKEE, Appellant.

October 12—November 7, 1906.

Liquor licenses: Revocation: Powers of Milwaukee common council.

The Milwaukee city charter (subd. 1, sec. 3, ch. IV), giving to the common council power to "license, regulate, and restrain" those engaged in the business of selling liquor, does not by implication empower the council to provide by ordinance how licenses to sell liquor may be revoked or to confer power to revoke them upon a court. The general laws on that subject (secs. 1558, 1559, Stats. 1898), enacted by the same legislature as was the charter provision, apply to all municipalities and are exclusive.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

On the 10th of July, 1905, the plaintiff in error was duly licensed by the city of *Milwaukee* to sell spirituous, malt, and intoxicating liquors within the city. He paid the prescribed license fee and complied with the requirements of the law to entitle him to conduct such a business until July 1, 1906. On December 8, 1905, petitioner was arraigned before the district court for Milwaukee county upon complaint of having sold liquors to minors contrary to the provisions of the city ordinances, and was convicted and sentenced to pay a fine for such offense. The court also determined and adjudged: "And the court further orders that the license be revoked." The

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part of the judgment imposing a penalty and costs of the action was paid by plaintiff in error and is fully discharged. On April 27, 1906, plaintiff in error petitioned the circuit court that a writ of *certiorari* issue to the district court and to the clerk thereof commanding return to be made to the circuit court by the district court and its clerk of the proceedings had and taken in that action, and praying that the part of the judgment revoking the license to sell liquors, granted him by the city of *Milwaukee,* be vacated and held for naught. A proper return was made in obedience to such writ, containing the judgment of the district court in the action specified in the petition, showing that the court had found plaintiff in error guilty of the offense charged and had imposed a penalty and the costs of the prosecution, and further adjudging: "And the court further orders that the license be revoked." It also appeared by the return that plaintiff in error had paid the penalty and costs.

A trial was had in the circuit court in the proceeding, and the court determined as follows: "It is adjudged (1) that that part of said judgment above referred to, wherein the saloon license of plaintiff in error is attempted to be revoked, be and the same is hereby reversed." This is an appeal from such judgment.

By sec. 3, ch. IV, of the *Milwaukee* city charter the common council is given power to enact

"ordinances, rules, by-laws and regulations for the government and good order of the city—for the benefit of the trade, commerce and health thereof—for the suppression of vice—for the prevention of crime—and for carrying into effect the powers vested in said common council, as they shall deem expedient; and to declare and impose penalties, and to enforce the same against any person or persons who may violate any of the provisions of such ordinances, rules, by-laws and regulations. And such ordinances, rules, by-laws and regulations are hereby declared to be, and have the force of law, provided, that they be not repugnant to the constitution of the United

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States or of this state. And for these purposes the common council shall have authority—anything in a general law of this state to the contrary notwithstanding—by ordinances, resolutions, by laws, rules or regulations."

By subd. 1 of this section the common council is given power:

"To regulate groceries, . . . saloons, gardens and all other places within said city, where wines and other liquors are sold for any purpose."

By sec. 7, ch. XVIII, of the General Ordinances of the city (1896) it is enacted that any licensed saloonkeeper who shall be guilty of the acts therein specified "shall be punished by a fine," in the amounts prescribed. It is further ordained as follows:

"Sec. 8. Whenever any person licensed under this chapter shall be convicted of any of the offenses specified in the last preceding section, the court in which conviction may be had or the common council shall have the power, in its discretion, to revoke or cancel any license issued to such person under the provisions of this chapter, and such license shall thereupon and thereafter be null and void."

For the appellant there was a brief by *John T. Kelly,* city attorney, and *Benjamin Poss,* assistant city attorney, and oral argument by *Mr. Poss.*

William M. Tibbs, for the respondent.

SIEBECKER, J. The revocation of respondent's license by the district court was admittedly sought to be accomplished under a city ordinance providing that a penalty should be imposed upon any person licensed to sell intoxicating liquors who should be guilty of violating the terms of the ordinance in the respects specified, and further providing:

"Whenever any person licensed under this chapter shall be convicted of any of the offenses specified in the last preceding section, the court in which conviction may be had or the common council shall have the power, in its discretion, to revoke

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or cancel any license issued to such person under the provisions of this chapter, and such licenses shall thereupon and thereafter be null and void."

Upon review of the district court's proceedings, the circuit court held that the district court had acted without power in revoking the license of respondent and that the action of the court was without authority, and it set the action aside.

The appellant urges that the circuit court erred in so holding, and insists that the judgment of the district court in revoking respondent's license was proper under the ordinance referred to. This presents the question whether the city had power to provide by ordinance how a license to sell intoxicating liquors might be revoked and to confer such power to revoke on the district court. Reliance for such authority in the city is placed on the provisions of ch. IV of the city charter. This chapter vests the municipal government of the city in the mayor and common council. Sec. 3 provides that the common council shall have the power to enact and enforce ordinances pertaining to all matters concerning the government of the city. Following this general grant of power to legislate respecting municipal affairs is an express enumeration of many subjects concerning which legislative authority is conferred, and among them is that of regulating and restraining the business of dealing in intoxicating liquors. We have then a special provision in the charter granting authority to deal with the traffic in intoxicating liquors, and we must look to this section to ascertain what authority the common council has to legislate on this subject. An examination of this provision of the charter (subd. 1, sec. 3, ch. IV) shows that the council is given power

"to regulate groceries, . . . saloons, gardens and all other places within said city, where wines and other liquors are sold, . . . and to license, regulate and restrain tavern-keepers, grocers, . . . keepers of . . . saloons, . . . or other houses or places for the selling or giving away spirituous, . . . or fermented liquors; and to classify, grade and regu-

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late the amount to be paid for licenses . . . and to restrain any person from . . . dealing [therein] unless duly licensed by authority of the common council; provided, the amount to be charged for any such license shall not [exceed the maximum or be less than the minimum] sum required by the general laws of this state, to be paid for like licenses in its towns and villages of the state, under the general laws which are hereby made applicable to all licenses granted hereunder, . . ."

It is urged that the powers enumerated in the foregoing provision "to license, regulate and restrain" those engaged in the business imply the power to prescribe upon what conditions that license may be revoked, and that the common council properly provided by ordinance in what manner such revocation should be made. We discover no such intention in the words of the grant, but, on the contrary, we deem the grant "to license, regulate and restrain" those engaged in the business to be an express limitation on the common council, empowering it to deal with the subject only in the respects these words imply. The words "regulate" and "restrain" do not in any sense mean revoke. As stated in *Mernaugh v. Orlando*, 41 Fla. 433, 437, 438, 27 South. 34, these words in a grant to a city to legislate on this subject cannot be construed to include the idea of "prohibit." The words must be deemed to have been employed in their usual sense, and cannot be enlarged by construction. It is manifest from the context of this grant that the legislature did not include in the grant the authority to prescribe how such a license should be revoked.

This conclusion is reinforced by consideration of the general legislation on the subject. Secs. 1558, 1559, Stats. 1898, which were passed by the same legislature that passed this charter provision and prior to it, prescribe by general law that licenses granted to persons engaged in the sale of intoxicating liquors shall be revoked by the proper town or village board or by the common council in cities upon complaint and notice to the party. The provisions of the statutes which in terms cover and deal with this subject, and are so framed as to ap-

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ply to all towns, villages, and cities in this state, are very persuasive of the conclusion that the legislature intended that the procedure provided thereby should be exclusive of all others providing for the revocation of such licenses, and should apply to all municipalities. Considering the extent of the power granted by the charter and the general legislative provisions regulating the subject, we think it is obvious that the common council of the city of *Milwaukee* had no power to provide by ordinance how such licenses should be revoked, that the ordinance authorizing the district court or the common council to revoke such licenses upon the conditions and terms prescribed in it is void to that extent, and hence that the judgment of the district court revoking respondent's license was properly declared to be void.

By the Court.—Judgment affirmed.

BOYLE and another, Appellants, vs. ROBINSON, Respondent.

October 12—November 7, 1906.

Deeds: Competency of grantor: Undue influence: Evidence: Burden of proof: Judgment: Witnesses: Attorneys at law: Physicians: Appeal: Immaterial error.

1. In an action to set aside a deed and a transfer of personalty by an aged woman to a daughter to the exclusion of her children by a former husband, the evidence (sufficiently stated in the opinion) is *held* to sustain findings of the trial court that the grantor was mentally competent and that there was no undue influence.
2. Plaintiffs' evidence in such case is *held* not to have constituted such a *prima facie* showing of fraud or undue influence as to have put the burden of proof upon the defendant.
3. In an action to set aside a deed from a mother to a daughter, where a part of the consideration was a promise by the grantee to pay certain sums to plaintiffs, who were also children of the grantor, a judgment establishing the validity of the deed and

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directing payment of the agreed sums to plaintiffs was not erroneous because it made such payment conditional upon plaintiffs' paying defendant's costs and disbursements in the action, but should not have made such payment to plaintiffs conditional upon their paying defendant's expenses in connection with the action or conditional upon "the final termination of the action, by consent or otherwise, in accordance with" that judgment.

4. An attorney at law who drew a deed and a contract by the grantee to support the grantor, and who, at the grantor's request, signed such papers as a witness, was properly allowed to testify as to the mental competency of the grantor at that time.
5. A physician who signed a deed as a witness is competent to testify as to the mental competency of the grantor, where his testimony does not involve disclosure of any communications received by him while attending the grantor as a physician.
6. Error in the admission of evidence is immaterial where, even without such evidence, the findings of the trial court are abundantly supported.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Modified and affirmed.*

This is an action to set aside a certain deed and an alleged assignment or transfer of certificates of deposit from one Bridget Duffy to the defendant, *Margaret Robinson,* on the ground of undue influence and incompetency. The plaintiffs are children of Bridget Duffy by her first husband, one William Whalen, now deceased, and defendant a daughter by a second marriage with one Michael Duffy, now deceased. Bridget Duffy, prior to October 7, 1903, owned real estate in the city of Milwaukee valued at $25,000, subject to a $6,000 mortgage; also certificates of deposit in the Second Ward Savings Bank for $3,843, together with some furniture situate in her home valued at about $100.

The complaint alleges the death of Bridget Duffy July 2, 1904, intestate; that she left surviving the plaintiffs and defendant as her only heirs at law; that on October 7, 1903, and prior thereto, she was the owner and in possession of certain real estate in the city of Milwaukee, describing it, and was

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eighty-two years of age at the time of her death, and had been prior thereto feeble in mind and body, and for a year or more preceding her death was incompetent to have the care and management of her estate or to care for herself; that on October 2, 1903, she took up her abode with defendant, *Margaret Robinson,* and continued to live and reside with her until the time of her death; that Bridget Duffy, by reason of her old age and bodily and mental infirmities, was easily influenced and subject to the control of defendant, and in consequence thereof defendant induced her by persuasion and the exercise of undue influence, while she was not of sound and disposing mind, to deed to defendant the real estate in question for the expressed consideration of $1, and that there was in fact no valid or good consideration moving from grantee to grantor for such conveyance; that between October 2, 1903, and the time of the death of Bridget Duffy, defendant induced her by undue influence to transfer without consideration certain certificates of deposit issued by one of the Milwaukee banks for about $3,800. The complaint prays judgment setting aside and canceling the deed in question and for general relief.

The answer denies the allegations of fraud, want of consideration, and undue influence, and alleges that the defendant for a long time prior to October 7, 1903, resided next door to Bridget Duffy, and with her from October 7, 1903; admits the execution and delivery of the deed from Bridget Duffy to defendant, also the transfer of the certificates of deposit; and alleges that the real estate in question was given and conveyed to Bridget Duffy by her husband, Michael Duffy, father of defendant, and by one Charles Duffy, a brother of defendant and son of said Bridget and Michael Duffy, and that the money for which the certificates of deposit were issued was given to Bridget Duffy by said Michael and Charles Duffy, or came from the income of the property so conveyed and given to Bridget Duffy by said Michael and Charles Duffy; and further alleges that, by reason of the plaintiffs being in no

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wise related to or of the blood of the said Michael Duffy and his son Charles Duffy, they have no right, title, or interest as heirs at law or otherwise of Bridget Duffy in any of the property described in the complaint, according to the provisions of sec. 2272, Stats. 1898. The answer further alleges that, at the time of the execution and delivery of the deed by Bridget Duffy to defendant, defendant executed an agreement in writing which was delivered to and accepted by Bridget Duffy, to the effect that the defendant would support, care for, maintain, nurse, and in every way provide for said Bridget Duffy during her life, and at the time of her death would pay to *Mary Boyle,* her half-sister, $1,000 in cash, to *James Whalen,* her half-brother, $500 in cash, and to the Gesu church of the city of Milwaukee, or to the proper officers thereof, $1,000 for masses, and cause to be paid to the Little Sisters of the Poor of the city of Milwaukee $500; that defendant has been at all times ready and willing to carry out the conditions of this agreement on her part; that no demand was made upon her by plaintiffs, or either of them, before the commencement of this action, for any matter or thing concerning the estate or property of said Bridget Duffy; and that she complied with all the conditions of this agreement as to the care and custody of Bridget Duffy, and is ready and willing to carry out the other terms and conditions thereof; and denies the other material allegations of the complaint, and prays that the same be dismissed with costs.

The court found:

"(3) That for many years prior to October, 1903, the defendant had resided next door to said Bridget Duffy and had looked after, cared for, and visited the said Bridget Duffy daily. (4) That from on or about the 2d day of October, 1903, to the time of the latter's death, the defendant lived with said Bridget Duffy and had looked after, supported, cared for, maintained, and in every way provided for the said Bridget Duffy. (5) That at the time of the death of said Bridget Duffy she was about eighty-two years of age, and had been for some time prior to that time feeble in body. (6) That

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on or about October 7, 1903, the said Bridget Duffy executed and delivered to the defendant a warranty deed of the hereinbefore described real estate. (7) That between October 7, 1903, and prior to January, 1904, said Bridget Duffy assigned and transferred to the defendant certain certificates of deposit, issued by the Second Ward Savings Bank of the city of Milwaukee, aggregating about the sum of $3,800. (8) That at the time of the execution and delivery of the aforesaid warranty deed by Bridget Duffy to *Margaret Robinson,* and in part consideration for the same, the said *Margaret Robinson* made and executed a certain agreement in writing and delivered the same to the said Bridget Duffy, and the same was received and accepted by Bridget Duffy at the time of the execution thereof, viz., October 7, 1903. (9) That said agreement, in substance, was a promise on the part of *Margaret Robinson* to support, care for, maintain, nurse, and in every way provide for Bridget Duffy, her mother, from the date thereof to the death of Bridget Duffy, and at her death to pay or cause to be paid to *Mrs. Mary Boyle* and *James Whalen* one thousand dollars ($1,000) and five hundred dollars ($500) in cash, respectively, and to pay or cause to be paid to the Gesu church of the city of Milwaukee, Wisconsin, the sum of one thousand dollars ($1,000) for masses, and to pay or cause to be paid the sum of five hundred dollars ($500) to the Little Sisters of the Poor of the city of Milwaukee, Wis. (10) That at the time of the execution and delivery of the aforesaid warranty deed by Bridget Duffy to *Margaret Robinson,* and in part consideration for the same, the said *Margaret Robinson* paid to the said Bridget Duffy the sum of one dollar ($1). (11) That at the time that Bridget Duffy executed and delivered the aforesaid warranty deed she was of sound and disposing mind and memory and mentally competent to comprehend the nature and effect of such transaction. (12) That at the times that Bridget Duffy assigned and transferred the said certificates of deposit she was of sound and disposing mind and memory, and mentally competent to comprehend the nature and effect of such transactions and of each of them. (13) That the execution and delivery of the said warranty deed was not procured by fraud, duress, or undue influence. (14) That the assignment and transfer of said certificates of deposit were not procured by fraud, duress, or undue influence."

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The court made conclusions of law in accordance with the findings, and judgment was entered upon the findings dismissing the complaint upon the merits, and ordering defendant to pay to plaintiffs their respective sums provided for in the written agreement executed and delivered by *Margaret Robinson* to Bridget Duffy October 7, 1903, such payments to be conditioned upon payment by plaintiffs of the amount for which they are respectively liable for costs and disbursements and defendant's expenses in connection herewith, and conditioned further upon the final termination of the action, by consent or otherwise, in accordance with the judgment; and further ordering that defendant have and recover from plaintiffs the sum of $146.64, costs and disbursements of the action.

From the judgment entered plaintiffs appealed to this court and assigned the following errors: The court erred in finding that Bridget Duffy assigned and transferred the certificates of deposit to the defendant. The court erred in finding that at the time of the execution and delivery of the warranty deed *Margaret Robinson* executed and delivered the agreement in question to Bridget Duffy and the same was received by her. The court erred in finding that at the time Bridget Duffy executed and delivered the warranty deed she was of sound mind and competent to comprehend the nature of the transaction. The court erred in finding that at the time Bridget Duffy transferred the certificates of deposit she was of sound mind. The court erred in finding that the execution and delivery of the warranty deed was not procured by fraud, duress, or undue influence. The court erred in finding that the transfer of the certificates of deposit was not procured by fraud, duress, or undue influence. The court erred in adjudging that the defendant pay to the plaintiffs the respective sums provided for in their behalf in the agreement executed and delivered by *Margaret Robinson* to Bridget Duffy on the 7th day of October, 1903, such payments to be conditioned upon the payment by plaintiffs of the amount for which they are

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respectively liable for costs and disbursements and the defendant's expenses in connection herewith, and conditioned further upon the final termination of the action by consent or otherwise in accordance with the judgment. The court erred in the admission of evidence. The court erred in refusing to find facts requested by the plaintiffs.

For the appellants there was a brief by *Ryan, Merton & Newbury,* attorneys, and *McCabe & Dahlman,* of counsel, and oral argument by *T. E. Ryan* and *C. A. McCabe.* They contended, *inter alia,* that the burden of proof was upon defendant to show that the transaction was untainted with fraud, duress, or undue influence. *Doyle v. Welch,* 100 Wis. 24; *Davis v. Dean,* 66 Wis. 100; *Henrizi v. Kehr,* 90 Wis. 344, 348; *Loennecker's Will,* 112 Wis. 461, 467. The attorney and the physicians who were subscribing witnesses might testify as such to the formal execution of the instruments, but should not have been permitted to make disclosures as to other matters. *Herman v. Schlesinger,* 114 Wis. 382; *In re Will of Hunt,* 122 Wis. 460.

For the respondent there was a brief by *McElroy, Eschweiler & Wetzler,* and oral argument by *F. C. Eschweiler.* As to the testimony of the attorney and the physicians they cited *McMaster v. Scriven,* 85 Wis. 162; *Koeber v. Somers,* 108 Wis. 497, 507; *Herman v. Schlesinger,* 114 Wis. 382, 389, 390; *Tichy v. Simicek* (Neb.) 95 N. W. 629; *Brown v. Brown* (Neb.) 108 N. W. 180, 181, 182. As to the validity of the transaction: *Winn v. Itzel,* 125 Wis. 19; *Vance v. Davis,* 118 Wis. 548; *Citizens' L. & T. Co. v. Holmes,* 116 Wis. 220; *Hermann v. Zachow,* 126 Wis. 441; *Schneider v. Vosburgh,* 143 Mich. 476, 106 N. W. 1129; *Drinkwine v. Gruelle,* 120 Wis. 628; *Haynes v. Harriman,* 117 Wis. 132; *Loennecker's Will,* 112 Wis. 461; *Linde v. Gudden,* 109 Wis. 326; *Deck v. Deck,* 106 Wis. 470; *Fox v. Martin,* 104 Wis. 581; *Jones v. Rice,* 99 Wis. 429; *McMaster v. Scriven,* 85 Wis. 162; *In re Nelson's Estate* (Neb.) 106 N. W. 326; *Meyer v. Arends,* 126 Wis. 603, 106 N. W. 675.

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KERWIN, J. The execution of the deed and the transfer of the certificates of deposit by deceased, Bridget Duffy, are attacked by plaintiffs on the ground of want of consideration, undue influence, and incompetency. The court below found against the contention of appellants on these questions of fact, and upon well-established principles such findings must be sustained, unless the clear preponderance of the evidence is against them. *Chase v. Hinkley,* 126 Wis. 75, 105 N. W. 230; *First Nat. Bank v. Buetow,* 123 Wis. 285, 101 N. W. 927; *Tate v. Jerman,* 123 Wis. 368, 101 N. W. 679; *Hutchins v. Bautch,* 123 Wis. 394, 101 N. W. 671.

1. Respecting want of consideration or failure on the part of *Margaret Robinson* to carry out her agreement made contemporaneously with the deed, providing for the support, care, and maintenance of the deceased, Bridget Duffy, during her life, and at her death the payment of certain amounts specified to the beneficiaries, there can be no question upon this appeal, so we shall confine our discussion here to the question of incompetency and undue influence.

The deceased, Bridget Duffy, and defendant's father, Michael Duffy, intermarried over forty years before the execution of the deed. The defendant is the only surviving child of Michael and Bridget Duffy. Plaintiff *Mary Boyle* is a married woman apparently in good circumstances, and plaintiff *James Whalen* testified that he went out of the laundry business in 1898, since which time he has lived on his principal, and has no family dependent upon him for support; that he lived in the family of Michael Duffy only six or eight months. The defendant, *Margaret Robinson,* is the mother of five children. Her husband became paralyzed in 1878 and since has been unable to work or aid in the support of the family, during which time defendant has supported herself and family, with the exception of some aid received from her son and daughters. There is testimony tending to show that it was the desire of the defendant's father that defendant

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should have the property in question; that the deed was prepared after Bridget Duffy had fully considered the matter and had been advised in respect thereto,—so it appears that the transaction was not carried out hastily or without due consideration on the part of Bridget Duffy.

Testimony was offered on the part of the plaintiffs respecting the peculiar actions of Bridget Duffy for some time prior to the execution of the deed, to the effect that deceased was failing rapidly and was weak in mind for some time before her death; also testimony in a general way that she was not fit to do business from May, 1902; that she would at times do peculiar things, and appeared to exhibit symptoms of forgetfulness, and at times when on the street would lose her way when within a block of her home, and that she would make large purchases, far beyond what was necessary; also testimony by servants that she appeared strangely, would go about the house from top to bottom as though looking for something; that she would go to bed at 9 or 10 o'clock in the forenoon and ask if it were not night, and would go to bed three or four times a day and get up again; that defendant at times said she did not know what she was going to do with deceased, and that a guardian ought to be appointed over her; that deceased would at times offer to pay for things purchased a second time, and did not seem to know clerks at the store with whom she had previously traded; and that she would get up at all hours of the night and very early in the morning; did not know persons with whom she had been well acquainted.

On the part of the defendant there is evidence tending to show that up to about the time of her death deceased was of sound mind and competent to do business; that she did the purchasing for the house; although weak physically did not seem weak mentally; talked about selling her property; was perfectly rational, active, and smart until shortly before her death; was a very clear-headed, sensible, astute, keen woman three weeks before her death, unlettered, but clear-headed;

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was mentally, though not physically, strong three weeks before death; talked about things that happened many years before; was secretive about her affairs and kept her own counsel, and was competent to transact business at the time the deed was made; that she lived nine months after execution of the deed. Some of the witnesses who testified on the part of the defendant had known deceased for many years and were intimately acquainted with her. Mr. Kershaw, who witnessed the deed, testified that he had known deceased for many years, and that he drew the deed in question at Mrs. Duffy's direction and took her acknowledgment, and that she was mentally competent when the deed was executed. Dr. Burgess, a physician in Milwaukee, whom deceased consulted concerning the transfer of her property, testified that the day preceding the execution of the deed, when he had a conversation with her about her property, and during the time he was there, up to the time *Mrs. Robinson* began to speak about her mother's physical condition, deceased was mentally competent to transact business; that he had a high appreciation of her intelligence. Jeremiah Quin, a prominent and respected resident of the city of Milwaukee, who had known Bridget Duffy for over thirty years, testified that he conversed with deceased about three weeks before she died; that she was a very clear-headed, sensible, astute, keen woman, unlettered, but very clear-headed, and that she was in mind mentally sound and competent, unquestionably; considered her of very sane mind, clear in her faculties and all right in every way; nothing in her actions, behavior, or conversation at any time prior to her death indicating that her mind was losing its power or that she was incompetent; she was certainly, to his mind, as vigorous three weeks before she died as she had been a year before; there was no substantial difference in her appearance or manner mentally, or the way she talked, three weeks before her death and conversations had for years past.

We have not attempted to review all the evidence, nor shall

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we do so. We have given merely a general idea of the evidence offered on both sides respecting the competency of Bridget Duffy.

On the question of undue influence there is but little evidence. Counsel for appellants relies mainly upon inferences drawn from the relation of the parties, the fact that defendant installed herself in the home of Mrs. Duffy, and shortly thereafter obtained the deed, together with the alleged claim that the transfer by Mrs. Duffy was improvident and made no ample provision for protection. There is evidence that Mrs. Duffy was a self-willed woman, and when her mind was made up she could not be turned; that she stated that she was going to give the property to defendant, because she was poor and needed it and because her father wanted her to have it. She made the deed and took the agreement after consultation not only with her lawyer, but with one of her neighbors in whom she had confidence. Obviously she entered into the transaction with care and deliberation. Some point is made by appellants upon the fact that defendant kept the transfer to her a secret and did not inform relatives of it, and also gave instructions when the deed was recorded to prevent publication of the recording thereof in the Milwaukee papers. But defendant testified that this was the wish of her mother. It also appears that at or about the time of the making of the deed defendant remonstrated and said: "I don't want mother to do this. It will make trouble with my sister." And Mrs. Duffy said she had been thinking about it a long time and that was what she wanted to do, and that there would be no trouble if defendant would keep her mouth shut. So it is very evident that Mrs. Duffy desired the matter kept quiet. Hence the instructions that the recording of the deed be not published. There is nothing in the evidence tending to show that the burden of proof was upon defendant. In *Winn v. Itzel,* 125 Wis. 19, 32, 103 N. W. 225, referring to *Davis v. Dean,* 66 Wis. 100, 26 N. W. 737, cited by counsel for ap-

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pellants, this court, speaking through Mr. Justice WINSLOW, said:

"After as well as before that decision it was the duty of the court at the close of the plaintiff's case to decide whether a *prima facie* showing of fraud had been made, if the question was raised by proper motion on the part of the defendant. After as well as before that decision, in case the trial court held that a *prima facie* showing of fraud had been made, the defendant could either stand upon the plaintiff's proofs and challenge their sufficiency in this court, or he could introduce his own proofs tending to rebut the plaintiff's case and establish his innocence. In this sense, and in this sense only, the burden of proof shifts. When the plaintiff makes a *prima facie* case, entitling him to relief if the proof stops there, the defendant must take up the burden and meet the case so made by other evidence. This is the case in all contests of fact. It is not peculiar to fraud cases. The rule of *Davis v. Dean* did not change the long-established rule, nor did it tend to do so. It simply announced what facts would be considered as *prima facie* proof of fraud, requiring explanation by the defendant."

2. Respecting the certificates of deposit, it is clear that they were freely and voluntarily turned over to defendant by Bridget Duffy, and that defendant drew the money and deposited it in her own name, and afterwards drew it at various times from October 13, 1903, to August 10, 1904, in amounts varying from $100 to $1,200, and $1,000 of it was drawn after Mrs. Duffy's death. It also appears that defendant applied part of the money so drawn with the consent and for the use of Mrs. Duffy, and there is evidence to the effect that part of the money was applied by defendant in payment of Mrs. Duffy's debts. But just how much was so applied does not definitely appear. We do not think the evidence shows that defendant became the owner of these certificates. We are in doubt whether the court below intended to so find, or whether the judgment is capable of such construction. The judgment decrees that the certificates were transferred to de-

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fendant, but whether in her own right, or for the use and benefit of Bridget Duffy, does not clearly appear. The judgment should therefore be so modified as to make it clear that the defendant's title to this money, or the portion remaining at the time of Mrs. Duffy's death, is not passed upon in this action.

3. Complaint is also made by appellants because the judgment makes the payments specified in the agreement of October 7, 1903, referred to in the statement of facts, conditioned upon the payment of costs and disbursements by the plaintiffs "and the defendant's expenses in connection herewith, and conditioned further upon the final termination of the action by consent or otherwise in accordance with this judgment." We think the judgment should be further modified by striking out the above-quoted portion, but we see no objection to the part which makes the payment of the amounts specified in said agreement conditioned upon payment of the costs and disbursements of this action.

4. Error is assigned upon the admission of evidence of Mr. Kershaw, an attorney who drew the deed and agreement in question. He was requested by Mrs. Duffy to sign the papers as a witness and did so. Upon the trial he was interrogated respecting the mental competency of Mrs. Duffy at the time of the execution of the papers, and the testimony was objected to and the objection overruled. The admission of his evidence was proper. *McMaster v. Scriven,* 85 Wis. 162, 55 N. W. 149; *In re Will of Coleman,* 111 N. Y. 220, 19 N. E. 71. Dr. Burgess, a prominent physician of Milwaukee, was also called and examined as a witness respecting the mental competency of Mrs. Duffy, and objection was made to his evidence on the ground of privilege. It does not appear, however, from the evidence that the answers to the questions asked Dr. Burgess involved disclosure of any communications received by him while attending her as a physician. Besides, it appears he signed the deed as a witness. His evidence was

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therefore competent. There may be doubt as to whether the testimony of Dr. Kelly was properly admitted, but it is wholly immaterial in this case whether competent or not, since there is abundance of evidence to support the findings without it, and therefore, upon well-established principles, its admission, even if improper, cannot affect the judgment. *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909; *Hill v. Am. S. Co.* 112 Wis. 627, 88 N. W. 642; *Duncan v. Duncan,* 111 Wis. 75, 86 N. W. 562.

By the Court.—The judgment of the court below is modified by adjudging that the certificates of deposit were transferred, but defendant's title to the money thereby represented is not passed upon; and further modified by striking out the last part of the nineteenth paragraph, which reads, "and the defendant's expenses in connection herewith, and conditioned, further, upon the final termination of the action, by consent or otherwise, in accordance with this judgment;" and as so modified is affirmed. No costs will be allowed either party in this court, except that respondent pay the clerk's fees.

MARLING, Respondent, vs. MAYNARD and another, imp., Appellants.

October 13—November 7, 1906.

Mortgages: Judgment for deficiency when foreclosure denied.

Where in an action to foreclose a mortgage it is adjudged that there can be no foreclosure, the personal judgment for deficiency authorized by sec. 3156, Stats. 1898, and demanded in the complaint cannot be rendered.

APPEAL from a judgment and an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

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This action was commenced May 8, 1903, to foreclose a note and mortgage executed by the Milwaukee Realty Company November 3, 1897, to the order of Henry Herman for $1,800, payable three years from the date thereof, which mortgage was on the land therein described and was recorded November 6, 1897, in vol. 398 of Mortgages on page 183. The amended complaint alleges in effect the facts stated; also that November 3, 1897, the defendants *Maynard* and *Agnew* for a valuable consideration guaranteed in writing the payment of the note and waived demand, notice, and protest of the same; that December 10, 1897, for valuable consideration, Herman duly assigned said note and mortgage to the plaintiff, and that such assignment was recorded April 17, 1903; that the realty company failed to pay the amount due November 3, 1900; that the plaintiff was the owner of the note and mortgage, and that there was due thereon $1,800 with interest thereon from November 3, 1902, at eight per cent. per annum; that July 5, 1902, the defendant Emma Nommensen agreed to purchase the mortgaged premises from the realty company, and received a warranty deed from that company of said premises September 12, 1902, and the same was recorded July 6, 1903; that the Henry Herman Company and Emma Nommensen had or claimed to have some interest in or lien upon the mortgaged premises or some part thereof, which interest or lien, if any, had accrued subsequently to the lien of said mortgage; that no proceedings had been had at law or otherwise for the recovery of the sum secured by said note and mortgage or any part thereof, and that no part thereof had been paid or collected except a portion of the interest as stated; that the premises were inadequate security. The complaint then demands judgment for $1,800 with interest from November 3, 1902, at the rate of eight per cent. per annum, and that unless the same should be paid within a year from the rendition of the judgment the premises be sold and conveyed to the purchasers; that if the

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moneys arising from the sale should be insufficient to satisfy the judgment, then, upon the filing and confirmation of the sheriff's report of the sale, specifying the amount of such deficiency, judgment be rendered against the defendants, the Milwaukee Realty Company and *Maynard* and *Agnew,* who were personally liable for the payment of the debt secured by the mortgage, for the amount of such deficiency with interest thereon from the date of the sheriff's report of such sale, and that the plaintiff have execution therefor.

The Milwaukee Realty Company and *Maynard* and *Agnew* answered and therein admitted that the mortgage was collateral security for the payment of the note, and that the same was recorded as alleged, and that *Maynard* and *Agnew* in writing guaranteed the payment of said note; and alleged that September 9, 1902, the note and mortgage were fully paid and discharged, and that the land was at the same time conveyed to Emma Nommensen, who thereupon took possession of the premises; and prayed that she be made a party defendant. The defendant Emma Nommensen was thereupon made a party defendant, and made answer and counterclaim and claimed to be a *bona fide* purchaser for value of said mortgaged premises free and clear of all incumbrances. The plaintiff replied to such counterclaim.

At the close of the trial of such issues the court found in effect that all the allegations of the complaint were true; that at the time of the execution and delivery of the note and mortgage *Maynard* and *Agnew* for value received guaranteed in writing the payment of the note and waived demand, notice, and protest; that the note and mortgage were assigned by Herman to the plaintiff and the assignment thereof recorded as alleged without any notice to the plaintiff of any fact impairing the validity or value thereof; that neither the principal nor interest had been paid except as stated; that July 5, 1902, the Milwaukee Realty Company contracted to sell the premises to Nommensen for $2,950, which contract of

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sale recited that there was on the premises a mortgage of $1,800 which the purchaser or her assigns agreed to assume as part of the purchase price of the premises, and that Nommensen immediately entered into possession under the contract and has continued in such possession ever since; that September 12, 1902, the defendants or some of them through *Agnew* paid to Herman the $1,800 remaining unpaid, and received from him a satisfaction of the mortgage and a warranty deed of the premises executed by the realty company; that at the time of such payment *Agnew* demanded the note and mortgage and was informed by Herman that he had not either of them in his possession at that time, but he agreed to procure and deliver them at some future time; that the satisfaction so received from Herman was duly recorded May 8, 1903, and the deed from the realty company to Nommensen was duly recorded July 6, 1903; that the plaintiff at no time prior to the beginning of this action had any knowledge of the negotiation for or purchase of said property by Nommensen, nor of the payment of said money, nor of the execution or delivery of said satisfaction, and Nommensen had no information that the plaintiff was the owner of said note and mortgage; that at the time of such payment to Herman he did not have the note or mortgage in his possession nor under his control, nor at any time since December 10, 1897, when they were assigned to the plaintiff, and that Herman had no authority to receive payment therefor; that the allegations of payment of the note and mortgage were untrue.

As conclusions of law the court found in effect that the plaintiff was entitled to the relief demanded in the complaint, and that the notice of *lis pendens* was filed May 14, 1903. On July 25, 1905, it was ordered in effect that the plaintiff was entitled to the usual judgment of foreclosure and sale, and that, in case of deficiency arising after applying the proceeds of sale, the usual judgment against the Milwaukee Realty Company as maker and *Maynard* and *Agnew* as guar-

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antors be entered according to law and the rules and practice of the court. Thereupon judgment was entered accordingly.

On November 23, 1905, the defendant Nommensen appealed to this court from the judgment so rendered and entered directing the sale of the mortgaged premises to satisfy the sum of $2,427.38, and from the whole of said judgment. Upon that appeal this court held in effect that the debt secured by the note and mortgage was not paid; that the plaintiff was not protected by the recording acts (sec. 2241, Stats. 1898), and that the withholding of the assignment of December 10, 1897, from Herman to the plaintiff from record until after Nommensen had purchased the premises and gone into possession, and paid the mortgagee for the same and received from him a release of the mortgage and a warranty deed from the realty company, was a persistent declaration to all persons dealing merely with the title that the mortgagee owned the mortgage and "that plaintiff was estopped, as against defendant, to deny the mortgagee's continued ownership and authority to discharge the mortgage, and that therefore defendant held the land discharged from the lien of the mortgage." *Marling v. Nommensen,* 127 Wis. 363, 365, 106 N. W. 844. The mandate of this court was "judgment reversed, and cause remanded with directions to enter judgment in accordance with the prayers of appellant's counterclaim, *as to her,* and for further proceedings according to law." 127 Wis. 363, 371, 106 N. W. 846. The prayers of appellant's counterclaim therein mentioned read: (1) that the plaintiff's complaint be dismissed; (2) that the claim of this defendant be established against any claim of the plaintiff in and to said premises; (3) that the plaintiff be forever barred against having or claiming any right or title to the land above described adverse to this defendant; (4) for the costs and disbursements of this defendant.

The *remittitur* having been filed in the trial court, such proceedings were had thereon that on May 29, 1906, the court ordered and adjudged that the judgment of July 25,

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1905, be and the same was thereby reversed, and the complaint dismissed as to Emma Nommensen; that her claim as against the plaintiff in and to the premises be established; that the plaintiff be forever barred against having or claiming any right or title to the premises adverse to Emma Nommensen; and that Nommensen have and recover from the plaintiff her costs. And said judgment contained this further provision:

"It is further ordered and adjudged that there is now due to the said plaintiff *Celia Marling* from the said defendants Milwaukee Realty Company, *Charles A. Maynard,* and *Andrew D. Agnew* the sum of $2,314.40, principal and interest on the said note, and the sum of $64.79 for costs and disbursements, and that the said plaintiff *Celia Marling* shall have and recover said amounts from the said defendants Milwaukee Realty Company, *Charles A. Maynard,* and *Andrew D. Agnew,* and from each of them."

On the several orders to show cause why said last-named judgment should not be set aside having been heard, the trial court on June 28, 1906, ordered that the said several motions of the defendants, the Milwaukee Realty Company and *Maynard* and *Agnew,* to vacate said judgment, etc., which were combined and heard as one motion, be and the same were thereby denied with $10 costs in favor of the plaintiff and against the said defendants. On July 11, 1906, the defendants *Maynard* and *Agnew* appealed to this court from that part of the judgment entered May 29, 1906, wherein it is adjudged that there is due to the plaintiff from the defendants *Maynard* and *Agnew* and the Milwaukee Realty Company $2,314.40 on the note and $64.79 costs and disbursements, and that the plaintiff shall have and recover said amounts from the three defendants last named, and from each of them; and the said *Maynard* and *Agnew* included in their said appeal the order of June 28, 1906, which denied their motions to vacate and set aside said judgment, and that appeal is from the whole and every part of said order and from that part of said judgment which is against them.

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For the appellant *Maynard* there was a brief by *W. E. & F. P. Burke,* and oral argument by *W. E. Burke.*

C. T. Wilcox, for the appellant *Agnew,* contended, *inter alia,* that a foreclosure action, though in equity, is regulated wholly by statute (Stats. 1898, ch. 135), every provision of which is in mandatory language and must be followed with reasonable strictness. If it were not for the statutory provisions the guarantors could not have been made parties defendant. A personal recovery is authorized only by means of a deficiency judgment; and there can be no deficiency judgment without a foreclosure sale. Denial of foreclosure ends the action. *Sands v. Kaukauna W. P. Co.* 115 Wis. 229, 236; *Duecker v. Goeres,* 104 Wis. 29; *Spengler v. Hahn,* 95 Wis. 472, 475; *Plankinton v. Hildebrand,* 89 Wis. 209; *Welp v. Gunther,* 48 Wis. 543, 548; *Laycock v. Parker,* 103 Wis. 161, 189; *Bostwick v. Van Vleck,* 106 Wis. 387; *Burdick v. Burdick,* 20 Wis. 348; *Tormey v. Gerhart,* 41 Wis. 54; *Mason v. Beach,* 55 Wis. 607; *Dudley v. Cong. of St. Francis,* 138 N. Y. 451; *Wrigglesworth v. Wrigglesworth,* 45 Wis. 255.

For the respondent there was a brief by *Turner, Hunter, Pease & Turner,* and oral argument by *L. S. Pease.* They contended, *inter alia,* that when the court is a court of general jurisdiction and parties have had full opportunity to produce all their evidence and all the evidence is produced as in the case at bar, and all the parties submit all the issues to the court, the court has complete authority to settle and determine all the rights of the parties. *Fanning v. Murphy,* 117 Wis. 408, 412, 414; *Palmeter v. Carey,* 63 Wis. 426, 430; *Halbach v. Trester,* 102 Wis. 530, 534; *Spengler v. Hahn,* 95 Wis. 472.

Cassoday, C. J. The question presented is whether the judgment entered May 29, 1906, to the effect that the plaintiff recover from *Maynard* and *Agnew* and each of them the

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amount due on the note with costs is justified by the mandate of this court on the former appeal. It is conceded by the plaintiff that in pursuance of that mandate the judgment of July 25, 1905, was to be reversed, and that the complaint for the foreclosure of the mortgage and the sale of the mortgaged premises should be dismissed, and that Emma Nommensen's claim to such premises be established, and that the plaintiff be forever barred from having or claiming any right or title to said premises. But it is claimed on the part of the plaintiff that the mandate permitted the action to continue so far as to enable the plaintiff to recover the amount due on the note from those personally liable for its payment. There are some difficulties in the way of such contention. At common law no such personal liability could be enforced in an action to foreclose the mortgage. Thus, it was held in New York at an early day:

"On a bill to foreclose a mortgage the mortgagee is confined to his remedy on the mortgage. The suit cannot be extended to the mortgagor's other property, or against his person, in case the property mortgaged is not sufficient to pay the debt for which it is pledged. The mortgagee's further remedy *is at law,* where he may sue at the same time on his bond or on the covenant to pay the money, and after a foreclosure of the mortgage in equity he may sue on his bond, at law, for the deficiency." *Dunkley v. Van Buren,* 3 Johns. Ch. 330; *Burroughs v. Tostevan,* 75 N. Y. 567, 572; *Frank v. Davis,* 135 N. Y. 275, 277, 278, 31 N. E. 1100.

It is only in so far as such rules have been changed by statute that personal liability can be enforced in such foreclosure action. For several years prior to the enactment of ch. 243, Laws of 1862, such rules of the common law were recognized and as modified by statute in respect to the joinder of causes of action were enforced in this state. *Walton v. Goodnow,* 13 Wis. 661; *Sauer v. Steinbauer,* 14 Wis. 70; *Cary v. Wheeler,* 14 Wis. 281; *Jesup v. City Bank,* 14 Wis. 331; *Faesi v. Goetz,* 15 Wis. 231; *Conn. Mut. L. Ins. Co. v. Cross,*

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18 Wis. 109. This last case indicated the change in such rules by the statute cited. Such statute was modified from time to time, but for nearly thirty years it has been the same as found in sec. 3156, R. S. 1878 and Stats. 1898. By virtue of that statute the complaint in this action contained "a demand for judgment for any deficiency which may remain due to the plaintiff after sale of the mortgaged premises against" the Milwaukee Realty Company and *Maynard* and *Agnew,* who were "personally liable for the debt secured by the mortgage, . . . upon the same contract which the mortgage" was "given to secure." That was the only complaint authorizing such judgment for deficiency, and that complaint was dismissed pursuant to the mandate of this court. The same section of the statutes authorized the rendition of "judgment of foreclosure and sale, and also for any such deficiency *remaining after* applying the proceeds of sale to the amount adjudged to be due for principal, interest, and costs," and provided that "such judgment for deficiency . . . be ordered in the original judgment and separately rendered against the party liable *on and after* the coming in and confirmation of the report of sale, and be docketed and enforced as in other cases." Pursuant to such statute the judgment of July 25, 1905, was entered, and it provided that, in case of deficiency arising after applying the proceeds of sale, the usual judgment for such deficiency could be entered against the persons so personally liable. No appeal has ever been taken from that part of the judgment. No sale of the mortgaged premises has ever been made, much less confirmed. And so no proceeds of sale have ever been so applied and no deficiency on such sale has ever been determined, much less adjudged. Such statute gave no authority for the rendition of the personal judgment against *Maynard* and *Agnew* entered May 29, 1906. Such personal judgment seems to have been rendered independent of the mandate and regardless of the statute. Id.; sec. 3071, Stats. 1898. It does not seem

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to be authorized by any adjudication of this court. See *Pereles v. Leiser,* 123 Wis. 233, 101 N. W. 413; *Fanning v. Murphy,* 117 Wis. 408, 94 N. W. 335; *Fuller v. Abbe,* 114 Wis. 127, 8 N. W. 825; *Kuener v. Smith,* 108 Wis. 549, 84 N. W. 850; *Kasson v. Tousey,* 96 Wis. 511, 71 N. W. 894; *Witter v. Neeves,* 78 Wis. 547, 47 N. W. 938; *Danforth v. Coleman,* 23 Wis. 528. As indicated, the personal judgment against *Maynard* and *Agnew* is not covered by the mandate nor authorized by the statutes, nor justified at common law, and hence is erroneous.

By the Court.—On the appeal of *Maynard* and *Agnew,* so much of the judgment of the circuit court of May 29, 1906, as is against them, and the order of that court refusing to set aside such judgment June 28, 1906, are reversed, and the cause is remanded with directions to dismiss the action as to such appellants.

WINSLOW, J. (*concurring*). I fully agree with the decision reached in this case, but I desire to add a few words on account of what seems to me an inaccuracy in the opinion of the court. It is true, as stated in the opinion, that at common law the principle was well established that the personal liability of the mortgagor could not be enforced in the equitable action to foreclose the mortgage. In *Walton v. Goodnow,* 13 Wis. 661, a foreclosure complaint, which also demanded a personal judgment for deficiency, was demurred to, and the demurrer was stricken out as frivolous by the trial court. Upon appeal this court recognized the principle above stated as existing under the old practice, and held that the question whether it still obtained under the Revised Statutes of 1858 was a fair question for argument, and hence that the demurrer should not have been held frivolous. Thus it will be seen that in this case the court did not decide that the common-law principle still prevailed in this state, but simply held that it was a question open to argument. The next case

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was that of *Sauer v. Steinbauer,* 14 Wis. 70, which was a foreclosure action brought against the mortgagor *alone,* and it was held that in such case the personal liability could be enforced in the foreclosure action under the Code provision authorizing joinder of actions; but the question whether the personal claim could be joined where there were other defendants in the foreclosure action not personally liable, was not involved and not decided. The latter question was presented in the immediately following case of *Cary v. Wheeler,* 14 Wis. 281, and it was held that such joinder could not be had if the proper demurrer was taken, but that otherwise the objection was waived and both causes of action could proceed to a judgment in the same action. These principles were followed in *Jesup v. City Bank,* 14 Wis. 331; *Stilwell v. Kellogg,* 14 Wis. 461; *Faesi v. Goetz,* 15 Wis. 231.

After these decisions came the enactment of ch. 243, Laws of 1862, which authorized a judgment for deficiency against the defendants personally liable in all foreclosure actions, when such judgment was demanded in the complaint. Thus, prior to the passage of this act, the law in this state was that the action at law could be joined with the foreclosure action where the mortgagor was the sole defendant, and could also be joined when there were other defendants in the absence of a demurrer on the ground of misjoinder. The common-law principle, on the contrary, was that there could be no enforcement of personal liability in any action of foreclosure. So it seems to me inaccurate, if not absolutely incorrect, to say that the common-law principle was enforced in this state by the decisions cited even in a modified form. See *Endress v. Shove,* 110 Wis. 133, 85 N. W. 653, where the effect of the decisions on this subject prior to the passage of ch. 243 aforesaid is explained.

This conclusion, however, does not affect the ultimate question in the present case. The complaint was a statutory complaint, under sec. 3156, Stats. 1898, which section au-

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thorizes a personal judgment in a foreclosure action for any deficiency remaining after applying the proceeds of the sale of the mortgaged premises to the debt and costs. It does not authorize a personal judgment for the debt generally, but only for the deficiency after the application of the security. Where there is no security, no foreclosure, and no sale, there can be no deficiency after sale, and hence no judgment for deficiency.

MARSHALL, J. I concur in the foregoing opinion of Mr. Justice WINSLOW.

DEWEY, Appellant, vs. FLEISCHER, imp., Respondent.
DEWEY, Respondent, vs. FLEISCHER, imp., Appellant.

October 13—November 7, 1906.

Life insurance: Holding policy in trust: Evidence.

To establish an oral agreement to hold in trust, in whole or in part, for the benefit of the wife of the assured a life insurance policy payable to the alleged trustee, the proof must be clear and convincing, and the loose and vague recollections of witnesses as to a conversation with such alleged trustee are not sufficient.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed in part; reversed in part.*

This action was originally brought by plaintiff against the Prudential Insurance Company to recover upon a policy of life insurance issued upon the life of plaintiff's brother, Adolph Fleischer, of which the plaintiff was the sole beneficiary. The insurance company answered, admitting liability on the policy, offering to bring the money into court, and alleging that one *Jennie S. Fleischer,* widow of the deceased, claimed the same. *Jennie S. Fleischer* made petition to be made a party defendant, claiming that the policy was made

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payable to the plaintiff simply to secure the payment of a loan of $100, made by plaintiff to Adolph, and that plaintiff agreed to hold the policy in trust for the benefit of the petitioner after payment of such loan; and further claiming that plaintiff was financially irresponsible, so that, if she obtained possession of the money, petitioner would be remediless. The court ordered *Jennie S. Fleischer* to be made a party defendant, and that her petition stand as her answer to the complaint, and also made an order discharging the insurance company from liability upon the payment of the amount of the policy into court. The plaintiff replied to *Jennie S. Fleischer's* answer, denying that the policy was held in trust, and alleging her own ownership thereof. The action was tried by the court, and findings were made to the effect that the policy was issued pursuant to an agreement between the plaintiff and Adolph that the plaintiff should hold the same as collateral security for the repayment of certain loans previously made by the plaintiff, her mother, Sophia Fleischer, and her husband, George Dewey, to Adolph, amounting with interest and premiums paid to $1,190.94, and the balance in trust for the benefit of *Jennie S. Fleischer.* Upon these findings judgment was entered, without costs to either party, that the plaintiff be paid $1,190.94 out of the sum deposited in court and the defendant be paid the balance, from which judgment both parties appeal.

For the plaintiff there was a brief by *Kronshage, McGovern, Corrigan & Fritz,* and oral argument by *Theodore Kronshage, Jr.*

For the defendant there was a brief by *Scheiber & Orth,* and oral argument by *C. A. Orth.*

WINSLOW, J. Both parties complain of certain rulings upon the admission of evidence, but we find it unnecessary to consider them. They have no material bearing upon the decisive question in the case, which is the question whether the

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evidence is sufficient to prove that the plaintiff agreed to hold the policy, or any part of it, in trust for the defendant. The plaintiff had an insurable interest in her brother's life. The policy was deliberately made payable to her, and she is entitled to recover the full amount thereof unless she made an agreement to hold it in trust for another. There was no written agreement of trust, but the attempt was made to prove a parol agreement. Was the proof sufficient for the purpose, in view of the rule that such proof must be clear and convincing and cannot consist of loose or vague expressions? 1 Perry, Trusts, § 86; *Allen v. Withrow,* 110 U. S. 119, 3 Sup. Ct. 517. We think not. A brief review of the evidence on the subject will be given.

The plaintiff lived in Milwaukee with her husband, George Dewey, who was in business in that city. Sophia Fleischer, the mother of plaintiff and of Adolph Fleischer, lived with them. Adolph Fleischer lived with his wife, *Jennie,* in Chicago, doing a small business which proved unsuccessful. During the years 1892 and 1893 Sophia and *Sadie* [the plaintiff] made loans to Adolph to help him in his business, aggregating $500, and George made him another loan of $100 in 1899. These loans were unpaid in the fall of 1902, when the plaintiff went to Chicago and made her brother a visit. There was some talk at this time about Adolph taking out a policy of insurance on his life in favor of the plaintiff. The plaintiff says that Adolph offered to take out a policy of $2,000 in plaintiff's favor if she would keep up the premiums, stating that she and George had helped him financially many times, and taken care of his mother twenty years, and that was the only way he could pay them, and that she said she would go home and ask George about it, and see if he would pay the premiums. The defendant says that the talk was about Adolph taking out some insurance to secure plaintiff for her loan of $100, and that whatever was left after that payment was to go to her, and plaintiff said she would go

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home and talk it over, and if she could see any way to carry it she would do so, and that plaintiff did not come to Chicago again to speak about the policy. The defendant also says that plaintiff said she was willing to carry it so she would be protected, and she would hold it in trust for defendant.

Subsequently, and about December 1st, Adolph made his application for a policy payable to plaintiff, and passed the examination, and the policy was written but not yet delivered. These facts were evidently communicated by defendant to the plaintiff by letter, although no definite proof of the contents of the letter appears; and on January 5, 1903, the plaintiff sent a letter to the defendant, of which the material part is as follows:

"DEAR SISTER: I rec. your letter this a. m. and hasten to answer same. I talked it over with George and have finally persuaded him to take the policy. He thinks the company is all right as far as that goes only it takes the money every year but I told him to try it and we could drop it at any time—*George says that it can be made out to me because Adolph is my brother but that the policy is his*—as I have not enough money to swing it—So it is all right being his money that is invested."

A few days later plaintiff wrote defendant the following letter (undated), inclosing a check of $73:

"DEAR SISTER: I am at the store writing this and do not know just what the exact amount was so sent check of $73 and you can let me know what you have decided on. SADIE.

"I will send this special so as to get there in time."

On January 9th the defendant mailed the policy to the plaintiff with a letter, the material part of which is as follows:

"DEAR SADIE: We received the check last night at 7 p. m. I send you the policy for $2,000 and the receipt for the same the balance $2.48 to apply on the $3,000 one the agent does not think he will have to be examined again and I hope he won't three times before he could pass."

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The defendant testifies to the sending of another letter by her to the plaintiff about a month or more after she learned that the policy was payable to *Mrs. Dewey,* "it must have been in 1903 after the policy had been issued," but, as this was after the contract had been fully completed, it can have no effect and will not be considered. It further appears that when the second premium fell due it was paid by the plaintiff.

Taking this testimony under its most favorable aspect for the defendant's contention, we are unable to see how it can be held to establish the making of any agreement to hold the policy in trust. Admitting it to be proven that there was talk about such a trust, and that plaintiff said she was willing to so hold it, it is indisputable by the defendant's own admission that no agreement was then made. She admits that the result of the conversation was that *Mrs. Dewey* made no definite promise to do anything, but said she would go home and talk it over, and if she could see a way to carry it would take it up. So, it must be considered established that the whole talk, whatever it was, was merely tentative. But, even if this were otherwise, the final arrangement was made in writing by the letters already quoted taken in connection with the policy, and this superseded any oral understanding or preliminary conversation. In this written contract there is no element of doubt. The plaintiff wrote that her husband would carry the policy, that it should be made out to the plaintiff, but was to be, in fact, his. A few days later the premium money was sent; and, in response to this, the written policy, payable to the plaintiff, was returned by the defendant. This closed a contract in writing absolutely certain in its terms, and there is no room for varying it by previous oral conversations.

The only other testimony upon the subject was the evidence of two witnesses as to some oral statements made to them by the plaintiff in the course of a conversation occur-

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ring about a week before Mr. Fleischer's death. One of these witnesses testified that the plaintiff said "she was carrying a policy to protect herself for money Mr. Fleischer owed her and to benefit *Mrs. Fleischer.*" The other witness testified that the plaintiff said she held a policy on her brother's life; that she had loaned him $100; that she had tried to help her brothers and sisters, but that she was safely secured for what her brother had borrowed of her, and she expected to see *Jennie* through; that she had only loaned her brother $100, and that the balance would go to *Jennie.* At the best these are but the loose and vague recollections of witnesses as to an oral conversation in which they had no interest, occurring two years previously. On their face they may well refer only to a benevolent intention, and they certainly cannot be held to satisfy the requirements of the law as to the kind of evidence necessary to establish a parol trust.

Judgment should have been rendered for the plaintiff for the whole sum. Both parties have appealed from the whole judgment. On the plaintiff's appeal that part of the judgment awarding her $1,190.94 out of the moneys deposited in court must be affirmed; and the remainder of the judgment reversed, with costs, and with directions to enter judgment awarding the payment of the remainder of the money in court to the plaintiff, with costs. The defendant can take nothing on her appeal.

By the Court.—It is so ordered.

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My Laundry Company, Respondent, vs. Schmeling, Appellant.

October 13—November 7, 1906.

(1–7, 9–13) *Contracts in restraint of trade or labor: Protection of business: Restraining breach: Pleading: Actual or threatened injury: Reasonableness of restraint: Good will: Consideration: Damages for violation during litigation: Equity: Fraud: Evidence.* (8, 16) *Appeal: Assignment of errors: Sufficiency of evidence: Points not argued.* (10, 17, 22) *Harmless errors.* (14) *Pleading: Counterclaim: Waiver of reply.* (15, 21–23) *Contempt: Costs and expenses, when recoverable: Counsel fees.* (17–19) *Reference: Vacating order: Resignation of referee: Hearing several matters together: Waiver of objection.*

1. In an action by the purchaser of an interest in a business to restrain the vendor from violating an agreement not to engage in the same kind of business in the same city, a complaint alleging that, contrary to such agreement, the vendor has engaged in such business by associating himself with others therein, and that the inevitable result of such connection, if it be permitted to continue, will be a large diminution in the value of the good will of the business purchased by plaintiff, sufficiently alleges that the restraint prayed for is necessary to the protection of plaintiff's business.
2. When a person sells out his interest in an established business and agrees not to enter into the same kind of business or be concerned in it in competition with that so sold, by necessary implication such agreement is material to the protection of such business.
3. An action to restrain the violation of such an agreement may be maintained if there has been an actual breach thereof which, unless restrained, will cause injury to plaintiff of a nature not remediable adequately at law; and it is not essential that actual injury should have been caused before the action is commenced.
4. One selling out his interest in a business may surrender, for a reasonable length of time and within reasonable limits as to territory, his liberty to engage in a competing business either as proprietor or as employee. The mere fact that such contract is in partial restraint of labor does not render it void as against public policy.

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5. An agreement by the vendor of an interest in a laundry business that he will not for a period of five years engage in any manner in the laundry business in the same city, "either by conducting a laundry establishment on his own behalf or in conjunction or jointly with any other person, or by entering the employ of any other person, firm, or corporation engaged in such business, in the capacity of an officer, manager, solicitor, or any other capacity whatsoever," does not bind such vendor not to engage in any kind of labor for any person engaged in the laundry business, but only binds him not to engage in that business in any manner or capacity during the time and within the limits named. So construed the agreement is reasonable and valid.
6. For the protection of a business sold by him a person may partially restrict the scope of his activity whether he is a trader or not and whether or not the business sold has, as incident thereto, a good will.
7. Upon a sale for a specified consideration of an interest in an entire going business, including the good will thereof, the vendor agreed that for a certain time he would not engage in that business in the same city. *Held*, that such agreement entered into and became part of the equivalent for the price paid.
8. Where it is not assigned as error that the findings of the trial court are not supported by the evidence, the supreme court is warranted in not considering that question.
9. In an equitable action, upon the establishment of plaintiff's right to have the defendant restrained from violating his agreement not to engage in a certain business, the court may, in order to do complete justice in the matter and render unnecessary a resort to an action at law, award damages on account of a violation of said agreement during the litigation.
10. In an action to restrain the violation of an agreement defendant claimed that the clause alleged to have been violated had been included in the contract by fraud. He testified that in the oral agreement between the parties nothing was said of the matter in question; that he read only a few lines of the written contract, and then signed it upon the assurance of the attorney for the adverse party that it was according to the oral agreement; and that he read very little English, but took papers at home. The court found that he examined the paper with care; that it was read to him; that he then signed it; and that there was no fraud. *Held*, in view of the evidence admitted and the findings, that there was no harmful error in excluding defendant's testimony as to what kind of papers he took at home, or what language was used in his family, or whether if he had read the

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contract he could have understood it, or whether he would have signed it had he known it contained the clause in question, or whether he intended to make the agreement expressed in that clause.

11. Defendant having violated his contract not to engage in the laundry business as an employee or otherwise, in an action to restrain such violation his purpose in going to work in a laundry was not material.
12. Evidence in such a case that defendant was dependent for a livelihood upon work in or about a laundry, was not admissible to show that the contract was unreasonable.
13. The reasonableness of a contract not to engage in a certain business is a matter of law to be determined from the contract itself, having regard to the limitations therein prescribed as to time and place and the purpose and scope of the restraint.
14. Where a trial proceeded from beginning to end upon the theory on both sides that the allegations of a counterclaim were in issue, a formal reply was waived.
15. A contempt proceeding to punish the violation of a temporary injunction is a proceeding in the action in which such injunction was granted, not independent of it.
16. Generally an assignment of error without any attempt to support it by argument in the brief or orally will not be considered on appeal.
17. The denial of a motion to vacate an order of reference because of prejudice of the referee, if error, was not harmful where the referee afterwards resigned and another was appointed.
18. The rule that, except as provided in sec. 2832 or sec. 2879, Stats. 1898, a judgment or final order cannot be vacated by the court entering it after the term of entry, does not preclude the appointment at any time of a new referee in place of one who has resigned and the vacation of the order appointing the first referee.
19. Where without objection a referee heard together two matters in the same action which had been referred to him, and no exception to his report on that ground was made in the trial court, the refusal to set aside the report will not be held erroneous on that ground.
20. The facts that, after sale of his interest in a laundry business, defendant violated his agreement not to engage in that business in the same city, that employees left the service of plaintiff and were hired by the concern with which defendant was connected, and that the places thus vacated were filled by plaintiff at increased expense, do not entitle plaintiff to recover such increased expense as damages for defendant's breach of

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the agreement, in the absence of evidence that such employees broke a contract in leaving plaintiff's service or that they would have remained with plaintiff for some length of time, ascertainable with reasonable certainty, if they had not been offered the opportunity to take service in the concern with which defendant was connected.

21. Under sec. 3490, Stats. 1898, in a contempt proceeding to punish a defendant who had violated a temporary injunction, although no actual loss or injury to plaintiff was shown, defendant was properly ordered to pay to plaintiff the costs and expenses incurred by the latter in prosecuting the proceeding.

22. Where in such case only the amount of plaintiff's costs and expenses was ordered to be paid, the wording of the order and judgment, directing it to be paid "to indemnify plaintiff for its actual loss and injury . . . and to satisfy its costs and expenses," etc., was a harmless irregularity.

23. Expenditures of the plaintiff for counsel fees are recoverable in such a proceeding, as proper items of expense.

APPEAL from judgments and orders of the circuit court for Milwaukee county: E. RAY STEVENS, Judge. *Modified and affirmed.*

Action to restrain defendants from violating a contract not to engage in or be concerned in the laundry business.

The differences between the parties, as indicated by the complaint, answer, and reply, are shown with sufficient clearness for the purposes of this appeal by the following summary of the findings:

(1) Plaintiff is a duly organized corporation engaged in general laundry business in the city of Milwaukee. (2) Defendant for the last twenty years has been a resident of said city. (3) For some time prior to October 3, 1903, defendant and Eugenie M. Comstock were copartners in the laundry business in said city of Milwaukee, said defendant spending most of his time in outside work and the success of the business being largely due to his ability to secure customers. (4) On said date by mutual consent such copartnership was dissolved and defendant sold his interest in the copartnership property for $3,500, the agreement in that regard being re-

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duced to writing. (5) As part of the sale contract defendant agreed, in these words, not to enter the laundry business:

"The said *August W. Schmeling* does further promise and agree and covenant to and with the said Robert W. Mueller and to and with the said Eugenie M. Comstock and their assigns, that he, the said *Schmeling,* will and shall not, for a period of five (5) years from the date hereof, engage in any manner in the laundry business in the city of Milwaukee, either by conducting a laundry establishment on his own behalf or in conjunction or jointly with any other persons, or by entering the employ of any other person, firm, or corporation engaged in such business, in the capacity of an officer, manager, solicitor, or any other capacity whatsoever."

(6) The contract was read to the defendant and he examined it with care and signed it. He was not induced to do so by any fraud or misrepresentations. Previous to the commencement of this action he entered the employ of the Badger Laundry Company, a concern engaged in carrying on laundry business in the city of Milwaukee. (7) After the commencement of this action and while a temporary injunctional order granted in the case restraining defendant during the litigation from violating his agreement as to being concerned in the laundry business was in full force, he built on lands owned by him in the city of Milwaukee a building peculiarly adapted to such business, borrowing $3,000 for that purpose, and refused to rent the building to a laundry concern desirous of securing the same, but leased it to one Piehler, who was not of sufficient means to conduct a laundry business without assistance from the defendant's wife. Defendant bought the machinery with which to equip the building and business and paid partly therefor by checks on his own bank account and prepared the premises for such business. He conducted the negotiations leading up to the partnership relations between his wife and Piehler and subsequently participated in negotiations resulting in the formation of the Sanitary Laundry Company, a corporation formed to carry on laundry business

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in the city of Milwaukee, which corporation was composed of defendant's wife, Piehler, and W. A. Hayes. After the laundry was started defendant was in and around the same and took part to some extent in its management. His wife had no knowledge of such business and relied on him in the matter. The said laundry business was started by the assistance of defendant's wife as a subterfuge for the purpose of avoiding the order of the court and the provisions of defendant's contract aforesaid. The said laundry company has hired help employed by the plaintiff company and taken customers from plaintiff through the association of the defendant with the said laundry company and the use of his name in the business. (8) After the making of said agreement between the defendant and R. W. Mueller a copartnership was formed between the latter and Eugenie M. Comstock to which was transferred the property, assets, stock in trade, and the good will formerly owned by the defendant and said Comstock, and thereafter plaintiff company was formed and all such property was sold thereto, including the benefits of the contract made by defendant as aforesaid, which benefits were necessary to protect the good will of the business in the possession of the new owner as successor to defendant and Eugenie M. Comstock. (9) Plaintiff now owns the beneficial rights under such contract which has been violated by defendant to plaintiff's damage.

As conclusions of law the court found that the restraint upon the liberty of the defendant provided for in his contract was fairly protective only of the interests of the plaintiff and not so large as to interfere with the interests of the public; that the contract was valid, and that an interlocutory judgment should be, therefore, entered in accordance with the findings, reserving the question of damages till the coming in of the report of the referee to be appointed to take evidence and ascertain the same.

The judgment so provided for was accordingly entered and

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the matter of ascertaining the damages recoverable was referred to Hon. Fred. Scheiber.

Proceedings were commenced in due form to punish the defendant for contempt in having violated the temporary injunctional order, as set forth in the foregoing findings, in which he was in due form found guilty and the matter of ascertaining the sum necessary to indemnify plaintiff for the actual loss caused to him by the defendant's said contemptuous conduct and the amount necessary to indemnify plaintiff for costs and expenses in the contempt proceedings were referred to said Scheiber, and it was ordered as punishment for the defendant's conduct that immediately upon the referee's report being confirmed defendant should pay plaintiff's attorney the sum finally determined to be necessary for indemnity, as aforesaid.

Special proceedings were instituted on behalf of defendant to vacate the reference to Mr. Scheiber on the ground of prejudice. The application was denied. Thereafter Mr. Scheiber resigned his position as referee and later, at a term of court subsequent to that of his appointment, on application of the plaintiff, the orders in that regard were formally vacated and the matters involved were referred to Hon. W. J. McElroy, who subsequently performed the duties of referee in the matter and reported the evidence taken by him and his conclusions to the court. Such conclusions were to this effect: By reason of the breach of the agreement set forth in the complaint plaintiff was compelled to incur extra expense for an engineer to the amount of $66, $8 extra expense for filling the place of another employee, and $95 for services of an attorney. By reason of the violation of the temporary injunctional order plaintiff was damaged to the extent of $19.25 for a copy of the testimony and $409.84 for attorney's services. There was a motion to set aside such report, which was denied. Thereafter, on application of the plaintiff, the report was modified by striking out the item of $95, and as

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so modified was confirmed. Judgment was thereafter perfected in the main action, the recoverable damages therein being placed at $74, and judgment was also perfected in the contempt proceedings, defendant being required within ten days to pay plaintiff's attorney $429.09 as indemnity for actual loss and injury to plaintiff by defendant's violation of the temporary injunction, and to satisfy its costs and expenses arising out of such misconduct.

Exceptions were taken on behalf of the defendant to preserve for review the questions referred to in the opinion. The defendant appealed from the judgment in the main action and in the contempt proceedings and from various orders affecting such judgments.

W. A. Hayes, for the appellant.

C. H. Hamilton, for the respondent.

MARSHALL, J. There is no assignment of error that the findings of fact or any of them are contrary to or not supported by the evidence. Some branches of the appellant's argument refer to that subject, but as there is no assignment of error, specially, in respect thereto we shall not examine any question in that regard, except where it is deemed to be necessarily called for by some assignment of error as to rulings on motions.

I.

The first four assignments of error relate to the subject of whether the complaint states a cause of action. The various propositions suggested for consideration, so far as they seem material, will be treated in their order.

1. There is no allegation in the complaint that the restraint sought to be imposed on the defendant is necessary to the protection of plaintiff's business.

The complaint contains this allegation:

"Notwithstanding said agreement, and contrary to the terms thereof, the said defendant has nevertheless again en-

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gaged in the laundry business in the city of Milwaukee by associating himself with the Badger Laundry, . . . and that the inevitable result of said connection, if the same be permitted to continue, . . . will be a large diminution in the value of the good will of said business."

That seems to sufficiently negative the proposition. Moreover, when a person sells out his interest in an established business and agrees not to enter into the same kind of business or be concerned in it in competition with that so sold, by necessary implication such agreement is material to the protection of such business.

2. There is nothing in the complaint showing that defendant before the commencement of the action breached the agreement by doing anything injurious to the plaintiff.

What has been said is a sufficient answer to that proposition. It was not essential that actual injury should have been caused before the commencement of the action in order to enable respondent to maintain the same. It was sufficient that there was an actual breach of the agreement mentioned, which, unless restrained, would cause injury to plaintiff of a nature not remediable adequately in an action at law.

3. The contract is one in restraint of labor and is invalid on that ground.

We are not favored with any authority to the effect that one may not in selling out his interest in a business surrender, for a reasonable length of time and within reasonable limits as to territory, his liberty to engage in a competing business, either as proprietor or employee. It would seem that the same rule which permits a person in selling out his interest in a business, as a part of the transaction to restrict his liberty to impair the value of the thing sold by engaging in the same kind of trade in one capacity, would justify restraining such liberty as to engaging in such business in any other capacity. That contracts of the former character, reasonable as to time and space, are valid is not questioned.

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They have been sustained by this and other courts generally. *Berlin M. Works v. Perry,* 71 Wis. 495, 38 N. W. 82; *Richards v. Am. D. & S. Co.* 87 Wis. 503, 58 N. W. 787; *Palmer v. Toms,* 96 Wis. 367, 369, 71 N. W. 654; *Tecktonius v. Scott,* 110 Wis. 441, 86 N. W. 672; *Cottington v. Swan,* 128 Wis. 321, 107 N. W. 336; *Ross v. Sadgbeer,* 21 Wend. 166; *Cowan v. Fairbrother,* 118 N. C. 406, 24 S. E. 212; *Hoagland v. Segur,* 38 N. J. Law, 230; *Perkins v. Clay,* 54 N. H. 518; *Guerand v. Dandelet,* 32 Md. 561; *Warren v. Jones,* 51 Me. 146; *Anchor E. Co. v. Hawkes,* 171 Mass. 101, 50 N. E. 509; *Hitchcock v. Anthony,* 83 Fed. 779, 28 C. C. A. 80; *Sternberg v. O'Brien,* 48 N. J. Eq. 370, 22 Atl. 348; *Barr v. Craven,* 89 L. T. Rep. 574; *Diamond M. Co. v. Roeber,* 106 N. Y. 473, 13 N. E. 419; *Wood v. Whitehead Bros. Co.* 165 N. Y. 545, 59 N. E. 357; *Nat. E. & S. Co. v. Haberman,* 120 Fed. 415; *Bancroft v. Union E. Co.* 72 N. H. 402, 57 Atl. 97.

The reason of the rule aforesaid, in terms or effect, is stated in the cases cited this wise: Inasmuch as public policy requires that a man should be free to sell in the most advantageous way what he has obtained by his skill or other means, the same policy should permit him to enter into restrictive agreements in aid of the thing sold, provided the restrictions, in the judgment of the court, are not unreasonable, having regard to the subject matter of the contract.

If the scope of the contract here were so broad as counsel for appellant contends, there might be some question as to its validity in its entirety. It is argued that the language "in any manner, either by conducting a laundry establishment on his own behalf or in conjunction or jointly with any other persons, or by entering the employ of any person, firm, or corporation engaged in such business, in the capacity of an officer, manager, solicitor, or any other capacity whatsoever," if enforced, would deprive appellant of liberty to pursue any manner of labor for any person or concern engaged in the

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laundry business. It does not seem so. The words "in the capacity of an officer, manager, solicitor, or any other capacity whatsoever" refer to the words "engage in any manner in the laundry business in the city of Milwaukee." The real meaning is that appellant shall not engage in the laundry business by entering into the employ of a person engaged in such business to work therein in any capacity whatever. Like contracts have been elsewhere similarly construed.

In *Barr v. Craven,* 89 L. T. Rep. 574, the facts were that an agent of an insurance company employed to serve in a particular district contracted "that he would not interfere directly or indirectly with the business" after resigning or being dismissed from his agency. The contract was construed to mean the business of the society in the district in which the agent contracted to aid it, and as so construed it was held valid.

Sternberg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348, seems to touch this case in respondent's favor at all points. The defendant entered the employ of the plaintiff, who was engaged in the instalment clothing business, in the capacity of collector, agreeing in consideration of the employment that for one year after its termination "he would not engage in or be concerned or interested in the instalment clothing business, in the city of Newark or Jersey City, on his own account, or as the agent or employee of any other person or persons, in any capacity." The court construed the contract as if it read will not engage in or be concerned or interested in the instalment clothing business in the city of Newark or Jersey City in any capacity, saying:

"It thus appears that the defendant's promise is that he will not take employment in a particular business in any capacity. When, therefore, the whole of the restrictive clause is read, it is made entirely plain that the restraint which the defendant put upon himself is not general, but partial, and that the only thing which he has prevented himself from doing, after he ceases to be an employee of the complainant, is

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engaging in or being concerned or interested in the instalment clothing business. He cannot serve or assist a rival business in any capacity, in either of the two cities named, but the interdiction is confined to that particular business. As to any other business or employment he is unbound and free. Anything outside of the instalment clothing business he is just as much at liberty to do for a rival of the complainant as though he had not made the contract in question."

The position taken that the agreement was a restriction upon the right to labor was condemned and the contract held valid. We have quoted at considerable length from the opinion, as it meets with our approval and covers fully the point raised by appellant's counsel.

There are many cases in the books in harmony with the foregoing. In *Hitchcock v. Anthony,* 83 Fed. 779, 28 C. C. A. 80, an agreement was sustained of a person, who purchased from another some land adjacent to that used by such other in conducting a coal and fish business, not to engage in the coal or fish business for a specified term of years, "or to do anything that will conflict with the said coal or fish business of the grantor."

In *Lange v. Werk,* 2 Ohio St. 519, an agreement not to "establish or be connected either directly or indirectly with any person (without the consent of the other party to the agreement) in the tar candle business," was condemned solely because it was not reasonably limited as to territory.

In *Alger v. Thacher,* 19 Pick. 51, an agreement not to "at any time hereafter in his own name, or in the name of another, conduct, carry on, use, or employ the art, trade, or occupation of an iron founder or caster, or be concerned, interested, employed or engaged, directly or indirectly, in any manner whatsoever, or under any pretense whatsoever, in the business of founding or casting iron," was held void only because of its being unlimited as to time and space.

In *Guerand v. Dandelet,* 32 Md. 561, an agreement, limited as to time and space, not to "directly or indirectly com-

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pete" with the vendee in conducting the business leased by the party so agreeing, was sustained.

In *Cowan v. Fairbrother,* 118 N. C. 406, 24 N. E. 212, an agreement by the vendee of a printing business, limited as to time and space, not to "edit, print, or conduct a newspaper or magazine, nor be in any wise connected with one printed anywhere" within the territory mentioned, was sustained.

The foregoing precedents seem to sufficiently answer the claim of appellant's counsel that the contract in question is void as a general restraint upon the right to labor, and the claim that the agreement is contrary to public policy. The appellant is free to engage in the city of Milwaukee in any kind of business except the laundry business. He is free to accept employment of a rival in such business in such city outside of the competing business. He is free to engage in the laundry business outside of Milwaukee at any time, and therein after the five-year period. The restraint is limited to the kind of business sold and as to time and space in a manner commonly sustained, as we have seen. Such restrictions satisfy every essential of the doctrine lately announced in *Cottington v. Swan,* 128 Wis. 321: "The restraint imposed is reasonable, under the circumstances, with reference to the situation, business, and object of the parties." It was "contracted for . . . the protection of the legitimate interests of the party in whose favor it is imposed." It "is reasonable as between them [the parties] and not specially injurious to the public." Reasonableness between the parties has reference to time, space, purpose, and scope. If all the tests in that regard are satisfied the public interests are satisfied. The time and space must not be so great as to have the effect of a general restraint. The purpose must have reference to the protection of the business sold, or in which the party restrained is in some capacity engaged, and which is reasonably benefited by the restraint. The scope of the restraint must be germane to such purpose.

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Our attention is earnestly directed to what was said in *Palmer v. Toms,* 96 Wis. 367, 369, 71 N. W. 654, where the court mentioned one of several exceptions to the general rule that contracts in restraint of trade are not permitted. The exception had reference to reasonable restraints upon the liberty of a person as to engaging in business injurious to the good will of a business sold by him, imposed as an aid to the sale. It seems to be thought that the court restricted such contracts to those made wholly for the protection of good will. That is not strictly accurate. The court mentioned one exception to a general rule which was appropriate to the case. One may by contract, legitimately, partially restrict the scope of his activity for the protection of a business sold by him or in which he is engaged, whether he is a trader or not and whether the business sold has, as incident thereto, a good will. The restriction may extend to his engaging in a competing business as proprietor or in any other capacity, subject to the limitations suggested. This sufficiently answers all contentions of appellant's counsel up to the next stated proposition.

4. Neither plaintiff nor its successors paid anything for the good will claimed.

The written evidence of what defendant sold and what was acquired by plaintiff shows that it was an entire going business, including the good will thereof and all property in use in connection therewith, and that $3,500 was paid therefor. It seems to follow, necessarily, that the thing sought to be protected by the restraint imposed on the liberty of the defendant was the subject of the sale and that such restraint entered into and became part of the equivalent for the $3,500.

5. The next proposition is that there is no evidence supporting the findings and judgment for an injunction.

As stated at the outset, there is no assignment of error that the findings are not supported by the evidence. That would warrant us in not examining the record as to this proposition. However, we have examined the same sufficiently to

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satisfy us that the findings as to appellant's having violated his agreement are not against the clear preponderance thereof.

6. The court erred in awarding plaintiff damages.

That is predicated on the theory, in part, that the complaint contains no claim for damages, which seems contrary to the fact; and again upon the theory that no damages were recoverable except such as were suffered before the action was commenced. In an action of this sort it is sufficient to allege an actual breach of the agreement and that damages have accrued, or will accrue, unless the court interferes to prevent a continuance of the breach, which will otherwise occur, and allegations otherwise bringing the case under a recognized head of equity jurisdiction. In case of the primary right involved being established in favor of the plaintiff, the court having jurisdiction of the parties and subject matter may properly, in order to do complete justice in the matter, rendering it unnecessary to sue at law for damages happening during the litigation, as ancillary to the principal matter of relief, award plaintiff compensation for such damages. The rule on that subject is quite ancient.

In *Nelson v. Bridges,* 2 Beav. 239, the facts were that during the pendency of a suit for specific performance of an agreement the subject of such agreement was in part taken away by the defendant, but the matter was not brought to the attention of the court before judgment in plaintiff's favor as to the primary right. Upon an application for relief in the action Lord LANGDALE said:

"If that circumstance had been known at the first hearing, I cannot have the least doubt but that the court would, in the exercise of its jurisdiction, have put in a due course of investigation the question of the amount of compensation which ought to be made to the plaintiff."

It being suggested that relief could be obtained or might have been obtained at law he said:

"I am of the opinion that it is not necessary for this court when it has once entertained jurisdiction in a case to resort

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to that circuitous mode of giving relief; I think, moreover, that if this matter had been before the court at the first hearing, it would have been put in a proper train of investigation."

II.

The fifth and sixth assignments of error cover matters indicated in the propositions following.

1. The court improperly excluded evidence offered by the defendant showing that the clause of the agreement claimed to have been violated, restraining the defendant from being concerned in a rival laundry business as an employee, was included in such agreement by fraud.

Appellant testified at length that he did not read the writing before signing; that in the oral agreement nothing was said as to his not working in a laundry; that he read a few lines of the writing and then signed it relying upon Mr. Comstock's assurance—acting for the adverse party—that it was according to the oral agreement; that he read very little English, but took papers at home. He was not permitted to testify as to what kind of papers he took or what language was used in his family, or whether if he had read the contract he could have understood it; or whether he would have signed it had he known of its containing the objectionable clause; or whether he intended to forego his right to be employed in a laundry. We are unable to see any harmful error in the exclusion of such evidence in view of the evidence which was permitted. When the defendant testified that he did not read the paper; that he read very little English; that the original agreement did not contain anything as regards his not taking employment in a rival business, and that he signed the paper relying upon Comstock's assurance that it was drawn according to the oral understanding, he covered everything that was material from his standpoint, especially in view of the court's findings of fact.

The court did not hold, as it seems, that if appellant did

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not know the contents of the paper he was necessarily bound by reason of inexcusable negligence, but found specifically that he examined the paper with care; that it was read to him; that he then signed it, and that no fraud was perpetrated upon him in the matter. With his statements that he did not read the paper, that it was not read to him, and that he relied wholly upon the assurance of Mr. Comstock as to its contents, disproved to the satisfaction of the court, it is not probable that the result could have been different though the excluded evidence, if proper, had been received. Therefore, in any event, the exclusion was not harmful.

2. The court improperly excluded evidence as to appellant's purpose in going to work for the Badger Laundry Company.

We are unable to see any materiality to such evidence. If what he did constituted a violation of his agreement, whether he had such a purpose in view or not could not affect the matter. He was permitted to testify fully as to the capacity in which he was employed by the Badger Laundry Company, which was that of bookkeeper and general office work, and clearly within the prohibition of the contract.

3. The court improperly excluded evidence tending to show the unreasonable nature of the contract.

The evidence excluded was directed to the subject of whether appellant was dependent for a livelihood on work in or about a laundry. We are unable to see that such circumstance, had it been established, could have affected the result. As we have seen, whether such a contract is reasonable or unreasonable is a matter of law to be determined from the writing, having regard to the limitations as to time and place and the purpose and scope of the restraint. They being reasonable, all essentials of a valid contract are present, because even if the party restrained of his liberty is deprived, partially, from participating in a particular vocation for a limited period, there is left ample opportunity for him to do so outside of the territory covered by his agreement.

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III.

The next assignment of error is that the court erred in denying defendant judgment on his counterclaim.

That is based on the theory that there was no reply. There are two answers to that. *First.* Though no reply is found in the record, the court in the decree recited that there was one in fact. *Second.* The trial proceeded from the beginning to the end upon the theory on both sides that the allegations of the counterclaim were in issue. That was a waiver of any formal reply. *Killman v. Gregory,* 91 Wis. 478, 65 N. W. 53; *Bowman v. Van Kuren,* 29 Wis. 209.

IV.

The next two assignments of error refer generally to this proposition: The contempt proceedings must fail, for such proceedings cannot be maintained independently of the action.

That proposition seems to be grounded on the theory that neither the facts alleged nor those proved show any ground for the action, and that the findings of fact are contrary to the evidence. Those matters are all sufficiently answered in other parts of the opinion. Certainly the contempt proceeding was in the action, not independent of it. The complaint stated a cause of action and the facts found both in the main action and the contempt proceedings show a violation of the temporary injunction. There is no assignment of error, as we have seen, that such findings are contrary to the evidence, and, if it were otherwise, our examination of the record leads us to the conclusion that counsel's contention would have to be overruled.

V.

Error is further assigned upon the exclusion of evidence offered by the defendant upon the issue of contempt.

Under this head we are referred to several pages of the printed case where it is shown that the evidence of witnesses

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tendered by appellant was excluded, but the error claimed is not supported by argument in the brief, nor was it orally. Generally speaking, an assignment of error without any attempt to so support it is not considered on appeal. *Butler v. State,* 102 Wis. 364, 78 N. W. 590; *Cornell v. State,* 104 Wis. 527, 80 N. W. 745; *Nix v. C. Reiss C. Co.* 114 Wis. 493, 505, 90 N. W. 437. That has not been strictly applied here, but will be as to treating the matter in detail in this opinion. We are unable to discover any harmful error in any of the rulings on evidence found at the pages of the printed case suggested. Some of the questions called for mere conclusions and were ruled out on that ground. Some of the questions were ruled out as leading. Some of the evidence was stricken out as not responsive. Some of the questions were asked upon the mistaken theory that the agreement was void as a general restraint upon the appellant. It is considered that no harmful error, if error at all, was committed by the court in this field.

VI.

Complaint is made because the court denied the motion to vacate the reference to Mr. Scheiber on the ground that he was prejudiced.

Appellant's motion in that regard was heard on affidavits and denied, as it appears, because the proofs were not sufficient to sustain his claim. We are unable to see wherein the court clearly committed error at that point, but in any event it was not harmful, since Mr. Scheiber resigned, the orders appointing him were in form vacated, and Hon. W. J. McElroy was appointed referee in his place.

VII.

Further error is claimed because the court vacated the order of reference to Mr. Scheiber.

The idea of counsel at this point is that the rule that a judgment cannot be vacated by the trial court after the term

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at which it was entered, except under sec. 2832 or sec. 2879, Stats. 1898, applies, and that the matter is governed by *Whitney v. Karner,* 44 Wis. 563; *Turner v. Nachtsheim,* 71 Wis. 16, 36 N. W. 637; and *Dufur v. Home Inv. Co.* 122 Wis. 470, 100 N. W. 831, and similar cases. True, except in case of mistake, inadvertence, surprise, or excusable neglect within sec. 2832, or an application for a new trial on newly-discovered evidence under sec. 2879, a judgment or final order in an action cannot be vacated by the court entering it after the term of the entry. That does not apply to those necessary orders in the progress of a case essential to its termination, such as one to fill the office of referee after the resignation or removal by the court of one previously appointed. Here, the first referee declined to serve by resigning. The only effect of the order complained of was to recognize the existence of the office as vacant and to fill it in order that the case might proceed. The court at all times has general authority over its referees, to remove them for cause and to afford the parties the benefit of such an instrumentality in determining the truth of the matters in controversy, by refilling the office. 17 Ency. Pl. & Pr. 1085. That must necessarily include authority to change the terms of an order of reference by naming a new referee whenever the place as first filled shall have become vacant by any means. Unless the law permitted such action our system of procedure would be quite infirm. The following cases bear on the question: *Parkhurst v. Berdell,* 87 N. Y. 145; *Forrest v. Forrest,* 3 Bosw. 650; *Norvell v. Gibson,* 6 Mo. App. 581.

In *Forrest v. Forrest, supra,* the court vacated the order of reference after a lapse of some three years, because the referee did not proceed expeditiously to close up the matter referred to him. In disposing of the subject this language was used by WOODRUFF, J.:

"The court would not of course compel a referee to act, against his inclination . . . when there are, no doubt, many

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who are not only willing but desirous of rendering such services. . . . That the court can vacate the order of reference and direct a reference to some person whose engagements are such that the reference will be proceeded in with reasonable dispatch is not doubtful."

VIII.

The next claim is that the court erred in refusing to set aside the report of the referee.

The motion was based on want of evidence to support the findings. Some complaint is now made because the referee heard the two matters referred to him together, but no exception seems to have been made to the report on that ground, and if there were we should be constrained to hold that there was no harm done appellant by the procedure. Moreover, it does not appear that there was any objection at the hearing before the referee to the trial of both of the referred matters together.

On this branch of the case it is insisted that there was no proof produced before the referee of damages caused by the breach of appellant's agreement as set forth in the complaint, though the referee found that there were such damages to the amount of $169 and the court confirmed the finding as to $74. True, all the evidence offered on that matter was directed to loss caused after the commencement of the action. So it was inaccurate to characterize the damages found as was done. However, that is not material. The more serious question is whether such damages were established. They were composed of $66, increase in expense of filling the place of engineer, because of an employee in such place going over to the Sanitary Laundry Company, and an increase of $8 in the cost of filling the place of another employee from the same cause.

There was ample evidence that the two employees left the service of respondent and were hired by the Sanitary Laundry Company, with which appellant was connected, and that

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the places thus vacated were filled at the increased expense found by the referee. There was no direct evidence that such employees were influenced to do as they did by appellant, but conceding that the court was warranted in finding from the circumstances that "the said Sanitary Laundry Company has hired help employed by the plaintiff company and taken customers from the plaintiff through the association of the defendant with the said Sanitary Laundry Company and the use of his name in the business thereof," and that such finding was binding on the referee, as it probably was, there was left to the latter the duty of determining whether respondent actually suffered loss by such conduct of appellant and, if so, how much.

On the subject of increased expense there was ample evidence, but there seems to be this serious infirmity in the proof: It does not appear that either of the employees broke any contract with respondent in leaving its employ, or how long they would have remained with respondent after the time they left its service but for the conduct of appellant. That was left by the proof to mere conjecture, since the employees were under no obligation to so remain. On the whole, we cannot see any sound basis for charging the increased cost of filling their places to appellant. The learned referee, seemingly, concluded that such cost was so chargeable as a necessary result of the finding that the Sanitary Laundry Company hired the employees after they left the service of respondent. We do not think such result would necessarily follow. Unless such employees would have remained with respondent for some length of time, ascertainable with reasonable certainty, had the opportunity not been offered them of taking service with the Sanitary Laundry Company, there would be no definite basis for charging the increased wages paid to fill their places to appellant. It appears that they were working for respondent by the week. It was their right at the end of any week to terminate the service.

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IX.

The further point is made that there was no proper basis shown for charging appellant in the contempt proceedings with the costs and expenses incurred by respondent therein, because no actual loss was shown. That matter is governed by the statute (sec. 3490, Stats. 1898), which provides that:

"If an actual loss or injury has been produced to any party by the misconduct alleged the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him and to satisfy his costs and expenses, instead of imposing a fine upon such defendant. . . . Where no such actual loss or injury has been produced the fine shall not exceed two hundred and fifty dollars over and above the costs and expenses of the proceedings."

It will be seen from the wording of the statute that indemnity refers to actual loss, but that the imposition of costs and expenses does not depend upon there being such loss. Without that element, under the rule in *Emerson v. Huss,* 127 Wis. 215, 106 N. W. 518, a fine should be imposed to go into the school fund when paid, but costs and expenses follow the conviction just the same as if there was actual loss. It is considered that the purpose of the statute is that such costs and expenses shall go to the party incurring them. That subject was not involved in *Emerson v. Huss, supra.* In a civil contempt proceeding there is no reason, it seems, why the costs and expenses should not go to the complainant upon a conviction of the alleged wrongdoer the same in one case as in another. The party making the expenditures in either is the complainant. Therefore, if they are to be paid at all by the wrongdoer it would require some unmistakable language in the statute to warrant holding that they constitute a part of and follow the fine proper. True, the words of the statute "the fine shall not exceed two hundred and fifty dollars over and above the costs and expenses of the proceedings" rather suggest that the fine, in the whole, includes the costs and expenses, but the ascertainment of those elements is

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plainly contemplated, the purpose being, it is thought, that it is the net fine only, as in other cases, which shall go to the school fund, and that the balance, as in such cases, shall go to reimburse the party making the expenditure. Sec. 2, art. X, Const.; *State v. De Lano,* 80 Wis. 259, 49 N. W. 808.

The supreme court of Michigan in considering its statute corresponding to our sec. 3490, Stats. 1898, exclusive of the last sentence, in *Holland v. Weed,* 87 Mich. 584, 49 N. W. 877, held a finding of actual loss to be indispensable to the imposition on the wrongdoer, for the complainant's benefit, of the latter's costs and expenses in the proceedings. It seems, however, that such conclusion was arrived at without reference to a companion statute, which is substantially identical with the last sentence of such sec. 3490. We are constrained not to follow the Michigan decision. It seems that had the court there construed the two sections together a different conclusion would have been reached.

The language of the court's findings and judgment is "that as punishment for his said misconduct, the said *August W. Schmeling* do . . . pay over to the attorney for plaintiff the said sum of four hundred and forty-nine and 9–100 dollars ($449.09), to indemnify the plaintiff for its actual loss and injury . . . and to satisfy its costs and expenses arising out of such misconduct on the part of said defendant." The actual loss spoken of in the statute is such as an action will lie for. *In re Pierce,* 44 Wis. 411; *State ex rel. Lanning v. Lonsdale,* 48 Wis. 348, 4 N. W. 390. That of course does not include costs and expenses of prosecuting the contempt proceedings. The items found by the referee and included in the final result are wholly of that character. So no sum should have been awarded to the respondent as for indemnity. The wording of the final order and judgment in that regard is irregular, but appellant was not harmed, because he was not made to pay a sum as a fine in addition to costs and expenses.

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It is earnestly contended that the sum awarded for costs and expenses is excessive. It seems large, but we are unable to discover that it includes anything but what is legitimate, if counsel's fees are recoverable, and no objection appears to be made on that ground. It would seem that in harmony with *Wis. M. & F. Ins. Co. Bank v. Durner,* 114 Wis. 369, 90 N. W. 435, they should be held proper matters of expense. Though the counsel fees there dealt with related to the dissolution of an injunction, why such expenditures are legitimate recoverable expenses in one case and not in the other is not perceived. In many jurisdictions, and we think by the weight of authority, such expenditures are recoverable in a proceeding of this sort where the statute provides generally for recovery of expenses. 4 Ency. Pl. & Pr. 807, note 3; 9 Cyc. 55, note 5; *State ex rel. Curtis v. Durein,* 46 Kan. 695, 27 Pac. 148; *Stahl v. Ertel,* 62 Fed. 920. The holdings are somewhat in conflict on this subject, but we think that the better view is the one we adopt here. The items making up the amount allowed as counsel's fees were testified to by respondent in detail, both as to necessity for the services and reasonableness of the charges, and his evidence was supported by considerable other evidence and there was no opposition thereto. We are unable to see with sufficient clearness that any item is exorbitant for the service rendered or that the labor was not reasonably necessary, to warrant us in disregarding the uncontroverted evidence and the deliberate judgment of the trial court.

The foregoing covers all matters that seem to require special mention in this opinion.

By the Court.—The judgment in the action so far as it awards $74 damages to the respondent is modified by striking out such award, and as so modified it is affirmed. The final order and judgment in the contempt proceedings is affirmed, as are all orders specially appealed from. Costs are allowed to the appellant to the extent of clerk's fees only.

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COMPTY, by guardian *ad litem,* Respondent, vs. C. H. STARKE DREDGE & DOCK COMPANY, Appellant.

October 13—November 7, 1906.

Streets: Deposit of building materials: Others using the place not trespassers: Child watching pile driver: Personal injury: Negligence: Contributory negligence of parent.

1. The lawful deposit of building material in a street, obstructing travel thereon to some extent, does not render others using that portion of the street trespassers, nor absolve the person depositing the material from the duty of ordinary care not to injure them.
2. A small boy who had for a short time been sitting upon building material in a street watching a pile driver on the adjoining lot was not a trespasser so as to absolve the contractor driving the piles from the duty of ordinary care toward him.
3. Evidence that a pile which was being driven by defendant near a street had been broken in two or three places by the pile driver so that another blow might well cause one of the pieces to fly out of place; that such breakage was obvious to those in charge of the work; and that they caused or permitted another blow to be given, whereupon a section of the pile flew out and fell upon the plaintiff in the street, is *held* sufficient to warrant a verdict finding defendant guilty of negligence.
4. Upon evidence showing, among other things, that a boy about three years old had been given his lunch in the kitchen; that his mother, who earned her own living and cared for her family, then turned to her housework in another room; that during the fifteen or twenty minutes following the boy went into the back yard, thence into the street in front and around two corners to a place about a block and a half away, where a pile driver was at work, and there was injured; and that the mother had never known the boy to go to that place before—it is *held* that the mother could not be declared, as a matter of law, to have been guilty of negligence in the care of the child.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Defendant was engaged by contract in the driving of foundation piles within the limits of property of its employer at the southeast corner of Michigan and Jefferson streets in Mil-

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waukee, and for that purpose had a number of piles scattered along opposite said property upon the easterly side of Jefferson street. People were in the habit of passing along such street, and children were often present, either in passing or in play. While defendant was engaged in driving a pile, the plaintiff, aged two years and ten months, in company with two other boys, was seated upon one of the logs within the limits of the street, and had been from five to fifteen minutes, according to varying testimony. Soon after commencing to drive the pile, at the second or third stroke or later, the pile broke transversely in two or three places, such breakage being apparent to observation. Thereupon another blow was struck, whereupon one of the sections of the broken pile flew out of the pile driver and fell upon the plaintiff, causing him severe injury. In an action for damages charging negligence of the defendant, a general verdict was rendered in favor of the plaintiff, after overruling motion for nonsuit and for direction of verdict in favor of the defendant. After denial of motion for a new trial, judgment was rendered upon the verdict in favor of the plaintiff, from which the defendant brings this appeal.

C. H. Van Alstine, for the appellant, contended, *inter alia,* that, the piles being lawfully in the street, the space occupied by them was withdrawn from public use. *Friedman v. Snare & T. Co.* 71 N. J. Law, 605, 61 Atl. 401. The plaintiff being a trespasser, he had no legal right that could be infringed by negligence on the part of the defendant, as distinguished from intentional injury. *Felton v. Aubrey,* 43 U. S. App. 278, 291; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 348. Defendant owed no greater duty to plaintiff because he was a child than if he had been an adult. *Felton v. Aubrey,* 43 U. S. App. 278; *Savannah, F. & W. R. Co. v. Beavers,* 113 Ga. 398, 21 Am. & Eng. R. Cas. N. S. 646, 54 L. R. A. 314, 39 S. E. 82; *Dobbins v. Mo., K. & T. R. Co.* 91 Tex. 60, 8 Am. & Eng. R. Cas. N. S. 179; *Hargreaves v. Deacon,*

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25 Mich. 1; *Stendal v. Boyd,* 73 Minn. 53, 75 N. W. 735; *Clark v. Manchester,* 62 N. H. 577; *Grindley v. McKechnie,* 163 Mass. 494, 40 N. E. 764. There was no implied invitation to sit on the piles. *Savannah, F. & W. R. Co. v. Beavers,* 113 Ga. 398, 21 Am. & Eng. R. Cas. N. S. 646, 656–658, and cases there cited; *Busse v. Rogers,* 120 Wis. 443, 98 N. W. 219; *Stendal v. Boyd,* 73 Minn. 53, 75 N. W. 735; *Ryan v. Towar,* 128 Mich. 463, 87 N. W. 644. No one is bound to watch for trespassers. *Masser v. C., R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 779, note. The right of the plaintiff in the street, assuming that the place where he sat had not been withdrawn from public use, was the right to pass and repass at his pleasure for the purpose of legitimate travel and for no other purpose. *Adams v. Rivers,* 11 Barb. 390, 392, 393; *Harrison v. Duke of Rutland* (1893) L. R. 1 Q. B. Div. 142; *State v. Buckner,* 1 Phill. Law (N. C.) 558; *Stinson v. Gardiner,* 42 Me. 248; *Tighe v. Lowell,* 119 Mass. 472; *Hurst v. Salem,* 121 Mass. 294; *Stickney v. Salem,* 3 Allen, 374.

For the respondent there was a brief by *Vilas, Vilas & Freeman,* and oral argument by *E. P. Vilas.* They cited *Reed v. Madison,* 83 Wis. 171; *Meibus v. Dodge,* 38 Wis. 300; *Busse v. Rogers,* 120 Wis. 443; *Delaney v. M. & St. P. R. Co.* 33 Wis. 67; *Hogan v. C., M. & St. P. R. Co.* 59 Wis. 139; *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626; *Davis v. C. & N. W. R. Co.* 58 Wis. 646; *Whalen v. C. & N. W. R. Co.* 75 Wis. 654; *Johnson v. L. S. T. & T. Co.* 86 Wis. 64; *Carmer v. C., St. P., M. & O. R. Co.* 95 Wis. 513.

DODGE, J. The sole assignment of error is upon refusal to order nonsuit or to direct verdict for defendant, which rests upon the contentions that no negligence was proved against it, that it is liable only for gross negligence, and that contributory negligence was established against plaintiff's mother. Of course, as appellant argues, mere carelessness is not ground of liability, unless a breach of some duty to others

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and committed under such circumstances as to render injury to the person or rights of another probable. Every one, however, owes a duty to exercise due care whenever negligence is likely, to the apprehension of an ordinarily intelligent and prudent person, to injure another in his lawful rights. There is abundant evidence of the frequent presence in Jefferson street, to the knowledge of the defendant's operatives, of people passing or pausing there in such proximity to the pile driver as to be in peril from flying portions of piles, should they break. Hence the reasonable anticipation of some injury from such an event might by the jury have been found. But, appellant argues, no duty rested upon defendant toward such people, except to refrain from gross negligence, for they were trespassers; and this because, by the exercise of defendant's lawful right to place in the street building materials inconsistent with occupation thereof for travel, it had temporarily ceased to be subject to such latter use. True, some limited right in the lotowner to incumber an adjoining street with building materials is recognized. *Hundhausen v. Bond,* 36 Wis. 29; *Raymond v. Keseberg,* 84 Wis. 302, 54 N. W. 612. The exercise of such right does not, however, transpose the street into private property. It is merely one of the lawful uses of the space as a public street, and is in deference to the rights of others to make all lawful use thereof. *Raymond v. Keseberg, supra; Van O'Linda v. Lothrop,* 21 Pick. 292. The presence of a vehicle in the street, while entirely lawful, is not exclusive of the right of another to be there, nor does such lawfulness absolve the owner from the duty of due care toward the other. Why should lawfulness of building materials have any greater effect? We cannot at all agree with the proposition that, because defendant had placed some materials within the limits of Jefferson street, all others using the street were trespassers, nor that defendant was absolved from the general duty of ordinary care toward them.

At this point counsel further insists that, whatever may

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be true as to a traveler, one using the street otherwise than for persistent travel is unlawfully using it, and therefore a trespasser, and contends that one standing in the street from motives of curiosity, or a child using the street for purposes of play, is within the application. He cites cases denying liability of municipalities to nontravelers and the definitions of travel there announced; but such cases present little analogy, for they go upon a strict construction of the statute imposing municipal liability, and, while holding that one must be a traveler in order to have the benefit of such statute, by no means decide that every other person is unlawfully within the street or a trespasser. *Reed v. Madison,* 83 Wis. 171, 177, 53 N. W. 547. It is settled that one is not an outlaw merely because engaged in an unlawful act within the street, but is nevertheless entitled to recover for an injury to which the unlawfulness of his own act has no proximate causal relation. *Sutton v. Wauwatosa,* 29 Wis. 21. Highways are devoted to all such uses as are ordinarily made of them, and we are not prepared to declare that standing therein to study a show window, or to discuss business or politics, may not to a reasonable extent be within the traditional uses of the public street. The question of the use of the streets by children is so fully discussed in *Busse v. Rogers,* 120 Wis. 443, 98 N. W. 219, that little need be added. Children, since long prior to the dedication of any of our streets, have used public places for play and satisfaction of their childish instincts and propensities. Such fact is known of all men, is involved in the use for which streets are dedicated, and is and must be taken into account by ordinarily prudent and humane persons in the regulation of their conduct. *Meibus v. Dodge,* 38 Wis. 300; *Johnson v. C. & N. W. R. Co.* 49 Wis. 529, 5 N. W. 886; *Hemmingway v. C., M. & St. P. R. Co.* 72 Wis. 42, 50, 37 N. W. 804. It is difficult to discover any respect in which appellant's contention is not directly refuted by *Johnson v. C. & N. W. R. Co.* There a little boy

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was playing upon defendant's tracks at a street crossing. The tracks were lawfully there. The court nevertheless held that, although yielding to childish impulse the boy had stopped to play, he was lawfully in the street, and the defendant owed him the duty of due care in operating its trains, and was liable for failure therein.

Appellant's principal reliance is upon *Friedman v. Snare & T. Co.* 71 N. J. Law, 605, 61 Atl. 401, and *Pueschell v. Kansas City W. & I. Works,* 79 Mo. App. 459. These cases, while in ultimate decision perhaps distinguishable from *Busse v. Rogers, supra,* rest largely on reasoning quite in conflict with our views as there expressed, and we should hesitate to accord them full force as authority. They are, however, so clearly distinguished from the case at bar as to be of little significance. In both the injury was caused by the material itself, which had been piled in the street, and was immediately induced by acts of the injured person in tampering with or climbing upon the piled-up beams. The trespass there declared to exist was trespass upon the personal property, and the holding was that one lawfully placing material in the street owed no duty to make such materials safe as playthings. In the present case the material in the street had nothing to do with causing the injury. Its presence is merely invoked to convict plaintiff of trespass in being at the place where he was injured by acts of defendant in operating its pile driver claimed to be negligent. We can discover no reason to avert the conclusion that defendant owed towards persons lawfully in the street the duty of due care in operating its pile driver, and that plaintiff's presence was not unlawful under the circumstances disclosed by the evidence most favorable to him.

Appellant's contention that there was no evidence of any negligence in operating the pile driver cannot be sustained. Three witnesses testified that at the penultimate stroke of the hammer the pile broke transversely in two or three places,

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so as to make obvious that another blow might well cause one or other of the segments to fly out of place. This breakage was plainly obvious to witnesses twenty to fifty feet away. Defendant's foreman, whose duty was to signal the engineer as to frequency and force of the blows, stood but three or four feet away from the pile, looking directly at it. The engineer was located but ten or fifteen feet from the pile, also watching it at each stroke of the hammer. The inference was entirely reasonable that they saw what was obvious to their eyes. If, knowing the breakage, the foreman permitted or the engineer caused the additional blow, we deem the inference of negligence entirely legitimate within the jury's province.

Upon the issue of contributory negligence of plaintiff's mother the evidence tends to show that she lived in a house something more than a block and a half from the place of injury, and around two street corners; that she was a woman who earned her own living as a nurse, and had the care of the housekeeping for her family, consisting of her mother, an adult brother, herself, and three children; that she had never known the plaintiff to go where the pile driver was at work; that on the day in question her brother was sick in bed, and she was engaged with her Saturday house-cleaning; that she gave plaintiff his lunch in the kitchen, which had a door leading to the back yard that was not locked; that after giving him his lunch she turned to her work in another room and was out of sight only fifteen or twenty minutes when she learned of his injury. To reach this place of danger he must have gone from the kitchen into the back yard, thence into the street in front, and around by the streets to the place of injury. We think that the ordinary mother of a family, under these circumstances, would be very much surprised to learn that she had been guilty of negligence in the care of an approximately three-year-old child. Certainly the fact of such negligence is not clear enough to be declared as mat-

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ter of law. *Johnson v. C. & N. W. R. Co.* 49 Wis. 529, 5 N. W. 886; *Hoppe v. C., M. & St. P. R. Co.* 61 Wis. 357, 21 N. W. 227; *Holdridge v. Mendenhall,* 108 Wis. 1, 83 N. W. 1109; *Decker v. McSorley,* 111 Wis. 91, 86 N. W. 554.

By the Court.—Judgment affirmed.

GUARDIANSHIP OF TANK and another.

October 13—November 7, 1906.

Guardianship of minors: Fitness of mother: Request of deceased father for appointment of another.

1. Upon the application by the mother of minors, after the death of their father, to be appointed their general guardian, it appeared that about twelve years before, while the wife of their father, she had been unfaithful to her marriage vow; that her conduct had been condoned by her husband, to whom she confessed, and that their marital relations continued thereafter for about a year and a half, when she procured a divorce on the ground of cruelty; and that she had married again, but had no other children. A referee found that ever since the transgression mentioned she had lived a virtuous and blameless life in that respect, and that she was a suitable person to have the care of her children. *Held,* that her former conduct was not of itself sufficient to render her unfit to be the guardian, and that, under all the facts and circumstances, there was no error in appointing her in preference to a brother of the deceased father.
2. Although the request of the parent having the custody of minor children as to their guardianship after his death should be given weight by the courts, it will not necessarily control in determining the question of suitableness as between the person so designated and the surviving parent.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is a proceeding for the appointment of a guardian

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for two minor children. The petitioner and the father of the children were husband and wife from 1892 to 1895. Petitioner in 1895 secured a divorce because of the husband's failure to support her and because of his cruel and inhuman treatment. It appears that the mother was at the time of the divorce without means, and that the father had threatened not to pay for the maintenance of the children if they were taken from him. Under these circumstances the care and custody of the children was given to the father, but the mother was given the right to visit them. This she did very regularly as long as the children remained in Milwaukee, where the mother has been since the divorce. Both parties again married. The mother, who has no other children, is now living with her second husband. After his second marriage the father lived most of the time in New York city. He died July 11, 1905, his second wife having died previously. Some time before the father's death the children were brought back to Milwaukee, and shortly after the death the mother instituted these proceedings for her appointment as general guardian of their persons.

An issue was raised by the answer of the appellants to the petition. This answer was in the nature of a cross-petition, and asked for the appointment of *Otto J. Tank* as general guardian. The mother filed a reply, and the matter was referred to a court commissioner as referee. The answer to the mother's petition alleges that the mother is an unfit person to have the care and custody of the children. It is alleged that her unfitness is shown by the fact that she sustained immoral relations with a roomer at their house about a year and a half before the divorce, that she is not a good housekeeper, and that her home is not a fit place for the children. It is further claimed that she has not a mother's affection for the children, that she was cruel and inhuman in her treatment of the father of the children, and that she is irreligious. *Otto J. Tank,* one of the petitioners in the cross-

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petition, is a brother of the father of the children, and sets up that he has been married for four years, and that he and his wife have no children; that they are warmly attached to the children, and are regular attendants at the Lutheran church, which was the church the father of the children attended; that they have ample means to support and educate the children without impairing the estate left them by their father; and that the father, knowing that his death was near, wrote to him, asking him to be appointed administrator of his estate and guardian of his children, and to be a father to the boys. He now asks to be appointed as such guardian. The petitioner in her reply denies the allegations of the cross-petition which allege her unfitness. Both parties offer to support and care for the children without impairing the estate left them by their father and to give the children the religious training desired by the father.

The referee found that the mother was a fit and suitable person to have the care and custody of the children, that the immoral relation which was so largely the basis of the charge of unfitness had continued for but a short time, that it had been confessed to and condoned by the husband, and that the petitioner had lived a virtuous and blameless life in this respect ever since—a space of over twelve years. The referee also found that the evidence tending to sustain the charge that petitioner was a poor housekeeper, that she was without a mother's affection for the children, that her home was not a suitable one for the children, and that she and her present husband do not live in peace and harmony, but constantly quarrel, to be of slight probative force, and that these charges were untrue. The referee reported that the best interests of the children would be served by the appointment of the mother as general guardian. The findings of the referee were approved by the circuit court, and an order was made accordingly. This is an appeal from the order of the circuit court.

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For the appellants there was a brief by *Kanneberg & Cochems,* and oral argument by *Adolph Kanneberg.*

For the respondent (petitioner) the cause was submitted on the brief of *A. C. Umbreit.*

SIEBECKER, J. The controversy in the proceeding turned upon the point of the mother's suitableness to have the custody of the persons of the two children and the care of their education. Sec. 3964, Stats. 1898. The natural right of the parent to have the care and custody of her children is freely conceded, but it is strenuously contended that the evidence adduced clearly shows that the petitioner's conduct and character and her condition in life render her unfit and unsuitable to be intrusted with the children's care, custody, and education. In support of this contention reliance is mainly placed upon the fact that she was guilty of and confessed to having had adulterous relations with a person who had resided at the home of her first husband. This was while she was living as his wife with the father of the children and about a year and a half before she was divorced from him in 1895. No point was made of this occurrence in the divorce proceedings. The facts that petitioner voluntarily communicated her incontinence to her husband shortly after its occurrence, that he condoned her transgression, and that they continued their marital relations for a year and a half before the petitioner instituted the divorce proceedings, probably explain why no allusion was made to this occurrence in the divorce action. In this divorce action she alleged cruel and inhuman treatment as the ground for divorce, and the court found it to be established. It appeared in this divorce proceeding that petitioner had no means for supporting the children, and that the father was a fit and proper person to have their custody, care, and education, and that he was able to support them. No finding was made by the court as to petitioner's fitness or unfitness to have custody of them. Under

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the judgment in this action the children were in the father's care and custody up to the time of his death, July 11, 1905.

The claim that petitioner's unfaithfulness in the respect charged is in itself sufficient ground to render her unsuitable to assume the trust she now seeks cannot be assented to. Such conduct must be given proper weight and consideration, and be considered in the light of all the facts and circumstances of the case, in order to ascertain her present fitness to assume the duties and responsibilities of the care, custody, and education of her children.

The following facts are material and bear upon this inquiry: The unfaithfulness charged occurred over twelve years before this proceeding was commenced. She resided for a year and a half thereafter with her husband as his wife, and during that time cared for these children. At the expiration of this period she instituted a divorce action, in which her husband appeared, but in which he made no charges of this nature. Two years after her divorce she married Mr. Meyer, her present husband. She has since then lived with him as his wife, and during this marriage she has been faithful to her marriage vows, and has performed her duty for the maintenance of a proper and suitable home. From the time of her divorce from the children's father she visited them while they resided in Milwaukee, and thereafter, by speaking of them to friends and in other ways, manifested a solicitude concerning their welfare, and evinced that she entertained a mother's interest in and affection for them. She now offers to care for them at the expense of herself and husband in her own home, to have them suitably educated in the schools, and to give them such religious instruction as their father desired they should receive. Her husband joins in her request, and pledges proper and adequate support to the children if their mother be appointed their guardian. The referee found that petitioner's conduct clearly showed reformation as to her alleged unchaste disposition and such

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a reliant probity of character as to remove any claim that she is now unfit in this respect to assume full charge of the care and education of the children. An examination of the record persuades us that this conclusion is well supported by the evidence and must be approved. Nor do we find that any exception can be sustained to the court's and the referee's finding to the effect that petitioner is possessed of acceptable accomplishments as a housekeeper, and that she and her husband so deport themselves in their family life as to render their home a suitable place for these children to live.

Much stress is placed on the father's request that his brother be made guardian after his demise. Courts always attach weight to such a request of departed parents, but they are not bound to control the court in determining the question of suitableness between the person so designated and those who sustain the parental relationship to the child. The courts have always recognized the sanctity of the parental relation and the parent's right to the care and custody of the children, unless it clearly appears that the parent is an improper and incompetent person to be intrusted with them. In considering this question the welfare of the child is always to be kept in mind. An important consideration in this respect is that the child should not be subjected to the contempt and derision consequent on having its parent declared to be an unworthy person, unfit to care for and nurture him. Applying these considerations to the situation presented by this record, we do not find sufficient evidence to impeach the referee's and the court's conclusion to warrant the inference that their judgment is not well founded, and to sustain the claim that the court erred in awarding the guardianship to the mother and in denying the relief prayed for by appellants.

By the Court.—Order affirmed.

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AUER, Respondent, vs. VAHL and another, Appellants.

October 15—November 7, 1906.

Landlord and tenant: Duty to make repairs: Modification of lease: Abandonment of premises.

1. An oral agreement, made some months after the execution of a written lease, relating to the making by the lessor of certain specific repairs in the leased building is *held* to have been separate from and independent of the lease and not to have altered or modified a provision therein that the lessee should make all necessary repairs inside the premises.
2. Where the lessee expressly covenanted to make all necessary repairs inside of the leased premises, he cannot justify an abandonment of the lease and refusal to pay rent on the ground of the lessor's failure to make such repairs.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

It appears from the record that April 6, 1904, the plaintiff by a written lease leased to the defendants the store and living rooms in the rear of the store and upper rear rooms of the premises described for the term of three years from August 1, 1904, at the monthly rent of $35, payable on the 1st day of each month during the term, and the first or August payment was therein made payable April 11, 1904, and was paid on that day, which lease contained several mutual agreements or covenants, among others the following:

"It is mutually agreed and understood that the said lessee shall keep the said premises in as good repair as the same are in at the commencement of said term, reasonable use and wear thereof and damage by accidental fire or other accidents, not happening through the neglect of said lessee, his agents or servants, only excepted. It is mutually agreed and understood that the said lessor shall keep the *outside* of said premises in good repair and whole, and the said lessee shall make all necessary *repairs inside* of said premises."

And further, "it is mutually agreed and understood that the said lessee shall keep the glass in the windows and doors

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in good repair and whole, damage by the elements only excepted." At the time of making the lease the premises were occupied by other persons who moved out the latter part of July, 1904. The defendants claim that the premises were then in bad condition. August 1, 1904, the defendants wrote to the plaintiff to the effect that if he was willing to fit up the store and rooms at once as indicated therein at a cost of $55 the defendants would be willing to pay on such bill $20, and designated the name of a person who would do the work for the amount stated. August 6, 1904, the defendants again wrote to the plaintiff that they could not understand why he did not let the contract to repair the store and rooms, and urged him to do so. August 11, 1904, the plaintiff wrote to the defendants to the effect that their representative had left with the plaintiff the Thursday before the key to the front door of the premises which they leased from August 1, 1904, asking the plaintiff to fix up the same, and further, that "we have repapered the walls of the store and the living rooms in the rear, and painted the woodwork in the store, as well as in the rooms and the store front. Will you kindly call or telephone and let us know what disposition you desire to have us make of the key, which will be at your office tomorrow noon?"

December 15, 1904, the plaintiff commenced this action. The complaint alleges two causes of action, one to the effect that the defendants had voluntarily and without cause abandoned the premises on or about August 12, 1904, and had not paid the rent for September, October, November, and December, 1904, amounting to $140, except that the plaintiff had collected from other parties as and for rent of certain portions of the premises for those months $72, leaving a balance of $68, for which he prayed judgment. For a second cause of action the complaint alleges that the defendants agreed to pay to the plaintiff the $20 mentioned for calcimining, painting, and papering certain rooms upon the premises, and also demanded judgment for $20.

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The defendants answered and admitted the making of the lease and the failure to pay rent during the four months mentioned, and that the premises were in good condition and repair at the time the lease was made, but denied that they abandoned the premises without cause, and alleged in effect that the former tenants had left the premises in an unfit condition for tenancy, and that thereupon they had notified the plaintiff that they would not retain possession unless the premises were put in good repair, and that the plaintiff had failed and neglected to repair as requested by the defendants. The defendants further answered by way of counterclaim, and claimed $200 damages for such failure of the plaintiff to repair the premises as requested, with which the plaintiff took issue.

The court instructed the jury that the plaintiff was entitled to recover the $68 for loss of rent as mentioned, and submitted to the jury the question as to the defendants' liability for the $20 mentioned. The jury found that the defendants were not liable for the $20, but only for the $68. From the judgment entered thereon in favor of the plaintiff for $68 and costs the defendants appeal.

For the appellants there was a brief by *McElroy, Eschweiler & Wetzler,* and oral argument by *S. F. Wetzler.*

Joseph G. Hirschberg, for the respondent.

CASSODAY, C. J. The jury found that the defendants were not liable to the plaintiff for the $20 which the defendants had offered in August, 1904, to contribute in case the plaintiff would make certain repairs. That eliminates from the case all question as to the plaintiff's second cause of action.

The error assigned and relied upon is that the court instructed the jury to render a verdict in favor of the plaintiff for the loss of rent amounting to $68. This ruling was evidently based upon the ground that it appeared from the undisputed evidence that the defendants had voluntarily aban-

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doned the premises without cause; and hence, under the written lease, they were liable for the rent which they had therein agreed to pay. It is conceded in the answer that the premises were in good condition and repair at the time of the execution of the written lease. As indicated in the foregoing statement, the plaintiff was only to "keep the outside of said premises in good repair and whole," and the defendants therein expressly covenanted and agreed to "make all necessary *repairs inside* of said premises" and to "keep the glass in the windows and doors in good repair and whole" and the premises in good repair. There is no claim that the plaintiff breached such written lease, nor that by the express terms of the written lease the defendants were not bound to "make all necessary repairs *inside* of said premises." The claim is that the plaintiff breached an alleged oral agreement made four months after the execution of the written lease. It is said that when such oral "agreement was made a new element was injected into the contract of leasing, viz., a covenant on the part of the lessor to make certain repairs, and from that time on the lease must be treated as though the agreement were expressly incorporated and stated in it." We find no evidence to support such contention. Neither the answer nor the letters of the defendants make mention or reference to any alteration or modification of the written lease. The oral agreement or attempted agreement relating to certain specified repairs was entirely separate and independent of the written lease. It was the basis of a separate and independent cause of action in the complaint, and so treated by the defendants and the trial court. On the undisputed evidence we must hold that the written lease was never altered nor modified.

As the case stands the defendants are seeking to justify their abandonment of the premises and refusal to pay rent on the ground that the plaintiff had failed to do what they themselves had expressly covenanted and agreed to do. It is

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well settled that, in the absence of any secret defect or deceit or warranty or agreement on the part of the landlord to repair, the tenant takes the leased premises in the condition they happen to be in at the time of the leasing. *Cole v. McKey,* 66 Wis. 500, 505, 506, 29 N. W. 279, and cases there cited. Among the cases there cited is *Hart v. Windsor,* 12 M. & W. 68, which seems to be directly in point. See, also, *Kuhn v. Sol. Heavenrich Co.* 115 Wis. 447, 91 N. W. 994. There is no dispute as to the amount of rent lost by the plaintiff by reason of the breach of covenants on the part of the defendants.

By the Court.—The judgment of the circuit court is affirmed.

STATE EX REL. THOMPSON, Respondent, vs. WELBES, imp., Appellant.

October 15—November 7, 1906.

Towns: Employment of attorney by the year.

The general provision in sec. 773, Stats. 1898, authorizing a town "to make all contracts necessary and convenient for the exercise of its corporate powers," does not authorize the employment of an attorney by the year, thus in effect creating and filling the office of town attorney,—since the specific provision of sec. 776 relating to the employment of attorneys shows clearly the legislative purpose that attorneys should be employed only for specific actions pending or about to be instituted.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

Mandamus to compel the supervisors of the town of Lake in Milwaukee county to execute a certain contract. The facts are stated in the opinion. *Paul Welbes,* one of the supervisors, moved to quash the alternative writ, and appealed from an order denying such motion.

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For the appellant there was a brief by *Boden & Beuscher*, and oral argument by *F. X. Boden*.

For the respondent there was a brief by *O'Connor, Schmitz & Wild*, attorneys, and *Jared Thompson, Jr., in pro. per.*, and oral argument by *Mr. Thompson*. As to the power of the electors to pass the resolution in question, they cited *Vincent v. Nantucket*, 12 Cush. 103, 105; *Tuttle v. Weston*, 59 Wis. 151, 153, 154; *Fox Lake v. Fox Lake*, 62 Wis. 486, 489, 490; *Woodman v. Bohan*, 91 Wis. 36, 37; *State ex rel. Mitchell v. Decatur*, 58 Wis. 291, 295, 296; *Butternut v. O'Malley*, 50 Wis. 329, 331; *State ex rel. Manitowoc v. County Clerk*, 59 Wis. 15, 17; *Cady v. Bailey*, 95 Wis. 370, 374.

WINSLOW, J. This is an appeal from an order refusing to quash an alternative writ of *mandamus*. It appears by the relation and alternative writ that the electors of the town of Lake (one of the country towns of Milwaukee county), at the annual town meeting in April, 1906, passed a resolution purporting to direct the employment of an attorney for the term of two years to prosecute and defend all actions in which the town should be a party or interested, and to advise the town officers on legal matters, at an expense of not more than $500 per annum, payable quarterly, and also directing the incoming board of supervisors to make a contract with the relator for such service if the relator so agreed; that at the first meeting of the new board of supervisors the relator was present and notified the board in writing that he accepted the employment and also submitted a form of contract signed by him in accordance with the resolution, and requested that the board execute it, which they refused to do. Thereupon the relator sued out an alternative writ of *mandamus* requiring the board to execute the contract or show cause to the contrary.

Assuming, for the purposes of the case only, that the board

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of supervisors may be compelled by *mandamus* to execute a contract which the electors of the town have legally directed them to make, the question to be considered and decided is whether the statute expressly or impliedly authorizes the electors of a town to direct the employment of an attorney by the year.

It is well settled that a town is a *quasi*-corporation only, with limited powers, and can do nothing which is not expressly authorized or clearly implied from authority expressly conferred by statute. *Eaton v. Manitowoc Co.* 44 Wis. 489; *State v. Bayne,* 100 Wis. 35, 75 N. W. 403. There are but two statutory provisions which have any material bearing upon the power to make the contract in question. Sec. 773, Stats. 1898, relating to the corporate powers of towns, authorizes a town, among other things, "to make all contracts necessary and convenient for the exercise of its corporate powers," and sec. 776, Stats. 1898, provides that the electors of any town at the annual town meeting shall have power:

"(2) To direct the institution and defense of all actions in which the town is a party or interested; to employ all necessary agents and attorneys for the prosecution or defense of the same, and raise such sums of money for that purpose as they may deem proper."

It is argued that a contract with an attorney to transact the legal business of a town by the year is a contract convenient, at least, for the exercise of the corporate powers, and, if the provision stood alone, the argument would have much force; but it does not stand alone. The legislature thought best to specifically treat the subject of the employment of attorneys by the electors in the second section above cited, and this section is, of course, controlling over mere general provisions. Careful reading of this last provision makes it clear that the legislative purpose was that the electors of the town should have power to employ attorneys to prosecute or defend actions

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pending or about to be instituted, not to employ an attorney by the year. The attorney was to be employed for a specific action or actions, not to become counsel generally for the town. Had it been thought necessary that a town should have an attorney by the year, the natural course would have been to provide for the election of a town attorney as in the case of villages and cities, but no such officer has been provided for or thought necessary.

The resolution in question seems to us to amount substantially to an attempt to create the office of town attorney and to fill it. In our judgment this is within neither the express nor the implied powers of the town meeting, and is contrary to the legislative policy, as clearly expressed in the statutes.

Neither the appellant's case nor brief was served within the time required by the rules, and the respondent moved at the argument for the imposition of the penalty prescribed by Supreme Court Rule 46, but did not desire a continuance. No reason appears why the penalty should not be imposed, and it will be so provided in the mandate.

By the Court.—Order reversed, and action remanded with directions to quash the writ and dismiss the proceedings. A penalty of $25 is imposed on the appellant for failure to serve the case and brief within the time prescribed by the rules, the same to be deducted from appellant's costs in this court.

CLARK, Respondent, vs. SLAUGHTER and another, Appellants.

October 15—November 7, 1906.

Gaming: Recovery of money lost: Pleading: Variance: Waiver: Evidence: Court and jury.

1. In an action under sec. 4532, Stats. 1898, the complaint alleged loss of money to defendants at roulette, but the evidence showed its loss at another game. There was no objection to the evidence on that ground, and the case was tried through-

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out as if the particular means by which the money was lost was not material. *Held*, that the variance was waived and that on appeal, so far as necessary to sustain the judgment, the complaint will be treated as amended.

2. Evidence showing, among other things, that defendants were the proprietors of the establishment where plaintiff lost his money; that apparently the persons who dealt therein with plaintiff were defendants' employees; that the money lost went into the drawer of the table at which the games were played; and that at the close of business it was taken charge of by one of the defendants, is *held* sufficient to take the case to the jury on the question whether defendants were the winners of plaintiff's money, although there was no direct evidence that the persons who attended said table were employees of defendants.

3. Evidence as to the amount of money lost by plaintiff, though not very certain as to the precise amount lost on each occasion and not wholly consistent, is *held* sufficiently definite to enable the jury to name a sum which, to a reasonable certainty, was lost as claimed.

4. The complaint contained a bill of particulars of specified sums lost on specified dates, but the case was tried and evidence of losses given, without objection, as if there were no bill of particulars. *Held*, that the variance was waived and that the verdict for plaintiff was not excessive merely because not limited to proven items from the bill of particulars.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action under sec. 4532, Stats. 1898, to recover money alleged to have been lost at gambling.

The complaint stated in substance this: Defendants during the times mentioned were copartners in operating a gambling house in the city of Milwaukee. Various methods of gambling were carried on, among them gambling by the use of a roulette wheel, whereby the loss went to the defendants. Plaintiff between March 28, 1904, and March 10, 1905, lost on the said roulette wheel specified sums of money aggregating $788. Such money was received and retained by the defendants though a return thereof before suit was demanded.

The defendants answered by a general denial.

The cause was submitted to the jury on the evidence and

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a verdict was rendered in plaintiff's favor for $748. Motions for judgment in defendants' favor notwithstanding the verdict and for a new trial were made. Both motions were denied and judgment was thereupon rendered in plaintiff's favor. The defendants appealed.

For the appellants there was a brief by *Rubin & Zabel,* and oral argument by *W. C. Zabel.*

Harry M. Silber, for the respondent.

MARSHALL, J. It is said by appellants' counsel that there was a fatal variance between the evidence and the complaint. The *gravamen* of the charge was that during the time mentioned the respondent lost a specified amount of money to the appellants at gambling. There was ample evidence that he so lost money in a place kept by defendants, but it was conceded that the loss happened while he was playing at the gambling game of craps instead of, as alleged, on a roulette wheel. There was no objection, however, to the evidence or the submission of the case to the jury on that ground. The cause proceeded from the beginning to the end as if the particular means of gambling by which the money was lost was not material. Under those circumstances the variance must be deemed to have been waived by appellants. *Matthews v. Baraboo,* 39 Wis. 674; *Russell & Co. v. Loomis,* 43 Wis. 545. The trial court might and would have ordered the complaint amended had attention been called to the matter and a request been made therefor. On appeal, as indicated in the cases cited, the complaint must be treated as amended, so far as necessary to sustain the judgment.

Sec. 4532, Stats. 1898, under which the action was brought provides:

"Any person who, by playing at any game, . . . shall have put up, staked or deposited with any stakeholder or third person any money, property or thing in action, or shall have lost and delivered the same to any winner thereof may,

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within three months after such putting up, staking or depositing, sue for and recover the same from such stakeholder or third person whether such money, property or thing in action has been lost or won or whether it has been delivered over by such stakeholder or third person to the winner or not, and may, within six months after any such delivery by such person or stakeholder, sue for and recover such money, property or thing in action from the winner thereof if the same has been delivered over to such winner; and if he shall not so sue for and recover such money, property or thing in action within the time above limited then any other person may, in his behalf and in his name, sue for and recover the same for the use and benefit of his family . . . from the winner thereof within one year from the delivery thereof to such winner."

The claim is made that no cause of action was established by the evidence under said section, because the proof did not show that appellants were the winners of respondent's money and that they received the same. True, the evidence was not very definite on those points, though it seems there was enough to carry the case to the jury under the rule that where the evidence of the plaintiff in any reasonable view of it, according thereto the most favorable inferences in favor of the plaintiff which it will reasonably bear, will sustain a finding in his favor and there are reasonable inferences conflicting therewith, the case should be sent to the jury for a determination of the truth of the matter involved, and the determination thus made, confirmed by the judgment of the circuit court, should not be disturbed on appeal. *Cawley v. La Crosse C. R. Co.* 101 Wis. 145, 77 N. W. 179; *Imhoff v. C. & M. R. Co.* 22 Wis. 681; *Dodge v. McDonnell,* 14 Wis. 553.

There was ample evidence that appellants were the proprietors of the establishment where respondent claimed to have lost his money; that the appearances in the operation of such establishment were that the persons who dealt with respondent were appellants' employees; that there was one person

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called a "banker" and one called a "dealer;" that the money lost went into a drawer in the crap table, and when the business of the day was over it was taken charge of by one of the appellants. They made no explanation of those circumstances. In that situation, notwithstanding there was no direct evidence that the persons who attended the crap table were appellants' employees, it was reasonably inferable that they were, and that the winnings deposited in the table went to appellants.

It is contended that the evidence was not sufficiently definite as to the amount of money lost to appellants to remove the question in regard thereto from the realms of mere conjecture, and, therefore, that the rule laid down in *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729, and similar cases should have been applied by taking the case from the jury on appellants' motion.

It is not considered that the evidence was so weak as to leave the jury no legitimate basis for a verdict. There was ample evidence that respondent lost considerable sums of money to appellants during the period covered by the complaint and on or about the particular dates therein mentioned. He testified to such sums aggregating $520, and testified generally to having lost to appellants during such period as much as $800. True, the evidence was not very certain as to the precise amount lost on each occasion specified in the complaint, and respondent's evidence at some points was inconsistent with his evidence at others. For example, he testified that his earnings were $90 per month, and the amount he claimed to have lost at gambling during some months with the amount he testified to having used otherwise during the same times considerably exceeded his wages, but all such matters were for the jury to consider. They were reconcilable to the extent of enabling the jury to name a sum which to a reasonable certainty was lost as claimed, and that was sufficient to carry the case to them.

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The further claim is made that the verdict is excessive. It seems that such claim has good support in the record, if the amount recoverable must be confined to the bill of particulars contained in the complaint. The action was not brought merely to recover $788 lost by respondent to appellants at gambling during the time stated in the pleading. The purpose was to recover specified sums of money so lost on specified dates, all aggregating $788. Of such sums, excluding one which was without the year period covered by the action, testimony was given as before indicated as to only $520. Such evidence was in substance as follows:

"In May I lost about $40. About the 1st of July I lost in the neighborhood of $50. The latter part of July I lost $20, I guess. In August I lost in the neighborhood of $30 or $40. In October the same year I lost about $50. In November thereafter I lost $80. In December following, I think about the 20th, I lost $80. In January thereafter I lost $60, the February succeeding $80, and in March thereafter $30."

In view of the foregoing, if the recovery were to be confined to the allegations of the complaint as to the specific sums lost, it is difficult to see how a verdict of more than $520 could be justified on the most favorable view for respondent that can be taken of the evidence. But it does not appear that the trial was conducted on the theory that only evidence of the losses specifically stated was proper. Without objection, the proceedings upon the trial were substantially as if no bill of particulars was contained in the complaint. Evidence was given without objection to the effect that during the year preceding the commencement of the action respondent earned $1,080; that the amount he paid therefrom to his family did not exceed $300, and that the balance, in the main, he lost at gambling at appellants' place. True, there was some evidence that a greater sum than $300 was paid to the family, but we must look at the evidence as a whole in the most favorable light it will reasonably bear

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for respondent. He testified at one point that he did not think he lost any money at appellants' place in September, though $60 of the sum alleged in the complaint to have been so lost was laid out in that month, but he also testified:

"I was there once or twice, sometimes three or four times, a month when I had money. I wish to be understood that throughout the year from March 10, 1904, to March 10, 1905, I gambled through every month. My loss for the year aggregated somewhere around $800."

He repeated several times the statement that he lost at appellants' place in all the sum mentioned. He further testified to the effect that he made the statement contained in the complaint a year before the preceding March, from his then best recollection; that he might have lost other sums than those specifically mentioned in his testimony; that he could not remember accurately particular dates and amounts. There being no objection at any time to the wide departure in the evidence from the particular items stated in the complaint, the variance between such evidence and the pleading must be regarded as immaterial under the rule heretofore stated in this opinion. The motion for a nonsuit and that for a new trial cannot be regarded as such an objection. When the evidence came in there was no objection, and the subsequent motions appear to have been based wholly on indefiniteness in the evidence.

Viewing the case as it was tried, viz., as one to recover, without strict regard to the bill of particulars, $788 lost during a year preceding the commencement of the action in gambling operations, without any preconceived notion of enforcing restitution of the loss, the evidence was about as definite as could be expected.

Of course, it was the duty of the jury in making up the verdict to place the amount of loss at a sum sufficiently low as not to rest on mere conjecture, but the rule is, as suggested, that on appeal a judgment cannot be reversed for want of

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evidence to support the verdict upon which it is based, unless it clearly appears that there is no credible evidence which, in the most favorable view that can reasonably be taken of it, will support such verdict. *Bohn v. Racine,* 119 Wis. 341, 96 N. W. 813. As there said, in case of room for conflicting reasonable inferences on the record as it comes to us, as to whether there was evidence warranting the verdict, a proper regard for the deliberate judgment of the circuit court refusing to set the verdict aside and grant a new trial should incline us to the view that it is right.

The evidence was quite like that in *Lear v. McMillen,* 17 Ohio St. 464, cited to our attention by counsel for respondent, where the court very properly said:

"We perceive [no] objection to allowing a recovery in one action, for the aggregate sums lost at different times, or for the sum of losses between certain dates, without showing the particular dates or amounts of each loss. . . . The [respondent] was entitled to recover of the [appellants] all the money they had won from him, and what the whole amount was, must be arrived at by the best evidence the nature of the case will admit."

That does not go so far as to allow a recovery upon mere conjecture. The result must be limited to such sum as can be seen from the evidence, with some reasonable degree of definiteness, to be proper. We cannot say that it appears with clearness sufficient to disturb the decision of the trial court that it was not so limited in this case.

By the Court.—The judgment is affirmed.

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CLAWSON, Plaintiff in error, vs. THE STATE, Defendant in error.

October 15—November 7, 1906.

False pretenses: Statute construed: Promissory note is "property:" Essentials of offense: Evidence.

1. A promissory note is within the meaning of the words "other property" in sec. 4423, Stats. 1898, making criminal the obtaining by false pretenses of "money, goods, wares, merchandise, or other property." DODGE, J., dissents.
2. The offense of obtaining property by false pretenses was not committed if the property obtained was only such as the accused was legally entitled to receive, even though he obtained it by means of falsehood. In such a case two essentials of the offense, viz., an intent to defraud and an actual fraud committed, are lacking.
3. The evidence in this case is *held* to show that at the time defendant obtained from one H. a promissory note for $500 he was entitled to demand and receive from H. that amount of money as a commission for finding a purchaser for a vessel, and hence that in obtaining such note defendant was not guilty of the offense of obtaining property by false pretenses.

ERROR to review a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Reversed.*

Information charging the defendant with obtaining a promissory note by the false representation that he had sold for $7,500 for the prosecuting witness a boat owned by the latter to one H. H. Hayward, a man who resided at Elks Rapids, Michigan, and was worth $100,000, the information charging that the statement that he had so sold the boat and that H. H. Hayward lived at Elks Rapids, Michigan, was false, as defendant well knew.

Evidence was given that the prosecuting witness, Hagerty, being half owner of a certain boat, agreed with defendant in writing to give him a commission of $500 if he "makes the sale, or is instrumental in making sale, of the steamer Belle at $7,500." On the following day, June 19th, *Clawson* produced a telegram dated Chicago and signed H. H.

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Hayward, directing him to close deal at $7,500, provided clear title was made in Hayward's name by Wednesday and placed in Kellogg National Bank. On the following day he asked for his commission, and Hagerty inquired as to who Hayward was, and, as he testified, was informed that he was a man living at Elks Rapids, Michigan, and was worth about $100,000. Whereupon, relying upon this statement, Hagerty gave to the defendant his promissory note payable to the latter or order, in thirty days, for $500, and wrote on the foot of it below his signature the following: "Due July 20th. This note is given in accordance with agreement with *Mr. Clawson.*" Evidence was offered that no such man lived at Elks Rapids, Michigan. There was evidence tending to prove that Hagerty was in some trouble with his partner as to accounts of the vessel and their respective interests, and was not able to produce a good bill of sale Wednesday, the 22d of June, as specified in that telegram. There was evidence of his attempting to buy out his partner at a less price and of his having commenced foreclosure and asking *Clawson* to attempt to get postponement for a few days, and the latter produced in response thereto a telegram dated Chicago, June 23d, signed Hayward, as follows:

"Perfect title in my name and place same in charge of Kellogg Bank. You inspect same, advise me by Friday. Will not entertain further delay."

On Friday Hagerty was still in controversy with his partner and did not produce at the bank the bill of sale, although he testifies that if the money had been there he could have obtained it. Defendant testified, with confirmation by another witness, that at that time he had received and had in his possession a certified check for $7,500 from Hayward, payable to Kellogg National Bank, which, under his directions from Hayward, he could only deliver when satisfactory conveyance was placed with that bank, and, no such conveyance being so deposited, he returned the check to Hayward on the follow-

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ing day. Hagerty, on July 8th, received a letter signed H. H. Hayward, care of Courtland Hotel, Chicago, offering to complete the purchase on the terms named if title were made by August 1st. To this Hagerty replied, but the substance of his reply is not in evidence. Neither party has since been able to find Hayward, the Courtland Hotel, where he made his headquarters in Chicago, having burned shortly after this time. The fact of the existence and apparent responsibility of H. H. Hayward was testified to by two Chicago witnesses, and the presence of such a man in company with the accused on the 17th of June inspecting the boat in question was also proved.

After motion to direct a verdict in favor of the defendant, a verdict of guilty was found by the jury, and, after motion for a new trial, judgment and sentence were pronounced, to which defendant sued out writ of error.

M. E. Davis, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and oral argument by *Mr. Titus.*

DODGE, J. 1. At the very threshold of this case we are confronted by a very important and doubtful question of law, affecting the general scope of this part of the criminal law of this state, on which we have received no aid from counsel on either side, and upon which the field of at least suggestive decisions is quite extended, and has involved us in much labor and research. That question is whether our statute (sec. 4423, Stats. 1898) makes criminal the obtaining by false pretenses a promissory note or other evidence of indebtedness. Our statute, adopted originally from Massachusetts, makes criminal only the obtaining of "money, goods, wares, merchandise, or other property." The Massachusetts statute was substantially an adoption of the English acts of 30 Geo. II. cap. 24, and 52 Geo. III. cap. 64. Since the respective adoptions the statutes have been modified both in

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England and Massachusetts by an addition to the list of property which might be the subject of the crime, of apt words to describe evidences of indebtedness, and in the overwhelming majority of other states the statutes defining the crime of false pretenses either nominate expressly "evidence of indebtedness" or do not, like ours, contain such a category of tangible material property as to suggest, by *noscitur a sociis,* a limitation of the final general words to similarity to such a preceding category. We have been unable to find either in England or in Massachusetts a decision whether evidences of debt might be the subject of obtaining goods under false pretenses during the period that their statutes failed to cover them specifically.

Our own statute was first considered in *State v. Green,* 7 Wis. 676, wherein the charge was of obtaining a check, which, however, seems to have been cashed, so that the accused did in fact obtain the money, although that fact seems not to have been charged in the indictment. No question was raised or considered by the court as to the sufficiency of this allegation to satisfy the clause of the statute, the indictment being held bad on other grounds. The next case was *State v. Kube,* 20 Wis. 217, which was a charge of obtaining "a package of money containing the sum of $60 in bank bills." The court held, not that bank bills were included in the expression "other property," but were described by the word "money;" for the reason that such word, in reasonable and colloquial use, signified whatever customarily passed current as a medium of exchange and commerce, and was not necessarily confined to coined metals. The next case of significance is *State v. Black,* 75 Wis. 490, 493, 44 N. W. 635, where the ultimate decision was that the obtaining of board and lodging, or, as the court characterized it, a mere credit, was not penal under this section. But it was there said:

"We are to remember that it is a criminal statute we are construing. It should not be so construed as to multiply crimes, unless required by the context. The word 'property'

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is, in many cases, construed to include 'things in action and evidences of debt. Subd. 3, 4, sec. 4972, R. S. 1878. But the words 'other property,' in the statute quoted, must, under the familiar rule, *noscitur a sociis,* be limited to such tangible classes of property as are therein previously enumerated; that is to say, 'money, goods, wares, merchandise, and other property' of that description."

In *Bates v. State,* 124 Wis. 612, 103 N. W. 251, the holding was that a charge of obtaining money was not satisfied by proof of obtaining drafts by one bank on another, although in course of discussion it was said that for the obtaining of such drafts the defendant could be prosecuted. That was said upon the authority of *Comm. v. Coe,* 115 Mass. 481, overlooking the distinction between the present statutes of that state and our own.

This seems to be the extent of decision on the subject in Wisconsin, and, as a result, we may fairly consider the question an open one here. The words quoted from *State v. Black* are perhaps a more deliberate and authoritative expression of the view of this court as to the true construction of this statute than the remark dropped in *Bates v. State,* but in both the court was speaking *arguendo* and not directly considering the question whether the words "other property" were intended by the legislature to include such an evidence of debt as a formal promissory note, bank draft, or a check, all of which are doubtless generally included within the word "property," when used in other statutes. Subd. 3, 4, sec. 4972, Stats. 1898; *Storm v. Cotzhausen,* 38 Wis. 139; *State v. Coyle,* 41 Wis. 267; *Wayland Univ. v. Boorman,* 56 Wis. 657, 14 N. W. 819.

In other states, where the statutes do not by clear expression include bills and notes, the decisions are in favor of their inclusion under such expressions as "other property," or "other valuable thing," or "valuable effects." *State v. Tomlin,* 29 N. J. Law, 13; *State v. Thatcher,* 35 N. J. Law, 445, 453; *State v. Switzer,* 63 Vt. 604, 607, 22 Atl. 724; *People*

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v. Stone, 9 Wend. 182, 190; *State v. Patty,* 97 Iowa, 373, 377, 66 N. W. 727. In the *Thatcher* and *Stone Cases* the court reaches this conclusion by somewhat dogmatically declaring that the intention of the legislature was obviously to include all things which might be the subject of larceny, and hence that the words "or other property" must be viewed as an intended addition to the more specific designations of property preceding them. In other words, that the rule *noscitur a sociis* should not be applied to restrain the concluding words from their full effect. In Iowa the application of the words "other property" to evidences of indebtedness is predicated on a provision of the Code similar to our sec. 4972, to the effect that property includes personal and real property, and personal property includes evidences of debt and things in action—an argument which has generally been denied full effect, for, uniformly, "other property," in these statutes, has been held not to include real estate. *State v. Burrows,* 11 Ired. Law, 477; *Comm. v. Woodrun,* 4 Clark (Pa. L. J. Rep.) 207 (*362); *People v. Cummings,* 114 Cal. 437, 46 Pac. 284.

The rule *noscitur a sociis* is, of course, only a rule of construction, although among those most frequently applied and perhaps most in accord with the real fact as to attempts to express in words those things as to which it was intended to legislate. If, however, the court is convinced that a general *et cætera* expression is appended to a list of specific designations with the intent to broaden the same, it is, of course, its duty to give such words that effect. "Other property," literally, is, of course, broad enough to include a promissory note or bill of exchange; hence, unless a court is convinced by the association of such words with others that they are used to express some more limited conception, there is ample justification for applying them to the full extent of their literal meaning. Doubtless there is cogent argument that such articles of property as those now under consideration are as

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likely to be the objects of cupidity, are as likely to be obtainable by misrepresentation, as any other forms of personal property, and that the injury to be done the defrauded person, and perhaps others, is, if anything, more imminent than in the case of tangible chattels. From considerations such as these, after giving due weight to the expression hereinbefore quoted from *State v. Black,* 75 Wis. 490, 44 N. W. 635, the court has concluded that the true intention of the legislature will be best given effect by holding that a promissory note is within the meaning of the words "or other property" in sec. 4423—a conclusion with which, I may be permitted to say, without a formal dissenting opinion, my personal views do not accord.

2. The trial court correctly instructed the jury that the offense of obtaining property by false pretenses involved at least four essential elements: (1) There must be an intent to defraud; (2) there must be an actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for that purpose. *State v. Clark,* 46 Kan. 65, 26 Pac. 481; *State v. Palmer,* 50 Kan. 318, 324, 32 Pac. 29; *People v. Wakely,* 62 Mich. 297, 28 N. W. 871; *Owens v. State,* 83 Wis. 496, 53 N. W. 736. In application of this rule it has been held that the first two of these elements do not exist where the property sought to be obtained, and in fact obtained, was only such as the accused had a perfect and complete legal right to receive. *Rex v. Williams,* 7 Car. & P. 354; *Comm. v. McDuffy,* 126 Mass. 467; *Comm. v. Harkins,* 128 Mass. 79, 82; *People v. Thomas,* 3 Hill, 169; *State v. Hurst,* 11 W. Va. 54; *Comm. v. Thompson,* 2 Clark (Pa. L. J. Rep.) 33 (*250); *Comm. v. Henry,* 22 Pa. St. 256. The special application in most of these has been to the obtaining by means of falsehood merely the payment of money to which the accused was legally entitled, it being held that thereby no fraud is worked

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upon the other party, and no intent to defraud can be inferred from such act.

Applying that principle to the present case, we have, without hesitation, reached the conclusion that the proof in the record is conclusive that at the time the defendant obtained the $500 note from Hagerty the latter owed him that amount of money; that, if defendant had sued Hagerty for $500 commissions for making sale of his vessel, any court must, upon the same evidence, have rendered judgment in the former's favor. There is, of course, no dispute that Hagerty agreed to pay the defendant $500 for making sale. The evidence is overwhelming and undisputed that defendant found a customer ready, able, and willing to take the property at the price fixed by the owner, at $7,500, and that Hagerty accepted such customer and the condition that he was to pay only when clear title was deposited with a specified bank. Thereafter Hagerty failed, for reasons of his own, to make out such title. He has offered some proof that he could have made it out any time had the money first been deposited. But the prior deposit of the money was not in accordance with the terms of the sale, and he refrained from perfecting title apparently by reason of his desire to acquire his partner's half interest at some less rate, either by foreclosure of a mortgage which he held thereon or by purchase. It matters not, however, what reasons controlled Hagerty. It suffices that he did, in fact, fail to perform on his part the terms of the sale effected by the defendant, to which Hagerty had agreed. True, some of these facts depend upon the testimony of the defendant, although in many respects he is confirmed by testimony of others. But there is nothing in the case to throw his testimony either in conflict with other facts or evidence or under suspicion. Evidence was offered by the defendant of his good character, standing in the community, and financial responsibility, whereby the door was opened to the prosecution to attack him in those respects. No evidence

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was offered that he was other than he described himself. There is a vague suggestion in argument that the nonappearance of the proposed purchaser, Hayward, at the time of trial, and defendant's inability to produce him, justified a suspicion that he was a myth. But it must be remembered that approximately a year had been allowed to elapse between the obtaining of the note and any complaint by Hagerty, and that during that time the hotel where Hayward made his headquarters, and where alone defendant had known him, had gone out of existence, and defendant had no starting point from which to search for the man. No reason is suggested for this delay on Hagerty's part. The note was protested against him only one month after it was given as being already transferred to a third party. The defendant was at least monthly in Green Bay, where he was well known and easy of access, either for demand of explanation, or for arrest if Hagerty believed him guilty of the crime now charged. Neither was there anything in defendant's conduct immediately following the transaction to justify suspicion. He remained at Green Bay in contact with Hagerty for nearly a week after he received the note. He at first used it only as collateral security for a small sum of money, so that it was open, in the main, to any defenses that Hagerty might have. With this uncontradicted evidence that defendant obtained nothing from the prosecutor except what he was entitled to and which should have been given him upon demand without the representations charged as false in the information, it is clear that the evidence did not establish either that Hagerty was defrauded or that the representations were made with intent to defraud. It was error to refuse defendant's motion for the direction of verdict in his favor.

By the Court.—Judgment reversed, and cause remanded for a new trial.

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NORTON, Plaintiff in error, vs. THE STATE, Defendant in error.

October 15—November 7, 1906.

Forgery: Check payable to order of another person: Intent to defraud: Evidence: Appeal and error: Record: Matters reviewable.

1. A check falsely made with intent to defraud and apparently sufficient on its face is a forgery, even though other steps (such as indorsement by the payee) would be necessary, if it were genuine, to perfect it in the hands of the accused.
2. A check payable to the order of the payee may be transferred without his indorsement and hence cannot be said not to be the subject of forgery by another person because without value in his hands.
3. The question of defendant's intent to defraud in falsely making a check is *held*, upon the evidence in this case, to have been one for the jury.
4. Where in a criminal case the bill of exceptions contains no exception to any portion of the charge to the jury, and the motion for a new trial did not specifically point out objectionable portions thereof, errors assigned upon the charge are not reviewable.

ERROR to review a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

On January 6, 1906, complaint was made in the municipal court for the city of Sheboygan charging plaintiff in error with forgery of an instrument of the tenor following:

"Sheboygan, Wis., Jan. 6, 1906. No. 14.
"BANK OF SHEBOYGAN
"Pay to John Walsh or order $52 75-100
"Fifty-two Dollars
"ERNEST GONZENBACH."

A warrant was issued. Plaintiff in error was arrested and bound over to the circuit court. He was there tried upon the information charging him with the forgery of this instrument, and found guilty by the verdict of the jury. The court pronounced sentence upon the verdict, imposing as pun-

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ishment confinement at hard labor in state prison for the term of eighteen months. The case is before this court for review on writ of error.

T. M. Bowler, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and oral argument by *Mr. Titus.*

SIEBECKER, J. The plaintiff in error was convicted on the charge of forging the check set out in the foregoing statement. It is averred that forgery cannot be predicated on this instrument because it had no legal efficacy in the hands of defendant. There is no question but that an instrument which is clearly void upon its face cannot be made the subject of forgery. *John v. State,* 23 Wis. 504. The check in question upon its face is in the usual form, and in the hands of the payee, if genuine, would be a binding obligation. The claim is made, however, that this check, if genuine, was not available to the plaintiff in error without the indorsement of Walsh, and that it must be held to be void and valueless in his hands, since the law could not presume that he could collude with Walsh to obtain his indorsement or that he would commit the offense of falsely impersonating him or forging his name as an indorser. We find no force in these objections. If plaintiff in error were charged with the offense of uttering this paper the considerations suggested in support of these contentions might have a bearing, but no such offense is here charged. It is immaterial that the instrument is not available for reasons not appearing on the face of it. If it is falsely made with intent to defraud and apparently sufficient on its face it is a forgery, though other steps were required to be taken, if it were genuine, to perfect it in plaintiff in error's hands. This is upon the ground that an instrument apparently valid on its face is only voidable, if genuine, by impeaching it directly. And so here, if plaintiff in error had

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passed this check, which is complete and valid on its face, its invalidity would be made to appear only by extrinsic evidence impeaching its apparent validity. Under such circumstances the instrument, if falsely made with intent to defraud, is held to be a forgery because it purports to be good. *Comm. v. Costello,* 120 Mass. 358; *U. S. v. Turner,* 7 Pet. 132; *Barnum v. State,* 15 Ohio, 717; *Harding v. State,* 54 Ind. 359; *Arnold v. Cost,* 3 Gill & J. 219; *Hess v. State,* 5 Ohio, 5; 19 Cyc. 1380. The contention that the check was without value in the hands of the plaintiff in error without the indorsement of Walsh is refuted by the decision of this court to the effect that a negotiable paper payable to the order of the payee may be transferred without his indorsement. *Esau v. Greene & B. Co.* 94 Wis. 8, 68 N. W. 405; *Lawless v. State,* 114 Wis. 189, 89 N. W. 891.

It is urged that the evidence fails to show that, if the plaintiff in error falsely made this check, he did so with intent to defraud. There is evidence in the case tending to show that plaintiff in error signed the name of Ernest Gonzenbach without authority; that he, in conversation with a clothing merchant, mentioned the fact of his having a check and made suggestions as to having it cashed; and that a check, with the one which he is charged with having forged, was found in his possession on the day of his arrest. He could give no satisfactory explanation as to how he had obtained them. Coupled with his admission to the officer when arrested, referring to an alleged former forgery, that he had "been at it again," this evidence furnished sufficient basis for submitting the question of the fraudulent intent to the jury. We find that the court fully apprised the jury that, in order to justify a conviction, the intent of the plaintiff in error to defraud must be found to have existed when he made the check. We are of the opinion that this question of intent to defraud was properly submitted to the jury, and, under the circumstances, their finding is warranted and binding.

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We are of the same opinion as to the sufficiency of the evidence that the offense was committed in Sheboygan county.

Some errors are assigned upon the charge of the court to the jury. The bill of exceptions contains no exception to any portion of the charge, nor does the motion for a new trial specifically point out, as a ground for a new trial, the objectionable portions of the charge. This state of the record does not present these questions for review by this court. *Nisbet v. Gill,* 38 Wis. 657; *Dean v. C. & N. W. R. Co.* 43 Wis. 305; *Wells v. Perkins,* 43 Wis. 160; *Grabowski v. State,* 126 Wis. 447, 105 N. W. 805.

By the Court.—Judgment affirmed.

THE STATE EX REL. PRAY and another, Respondent, vs. YANKEE, County Clerk, Appellant.

October 16—November 7, 1906.

Primary elections: Ballots: Written names.

Under the primary election law (ch. 451, Laws of 1903) the voters of a party may write in upon the primary election ballot the name of any person as their choice for the party nominee for any office, and such votes shall be counted; and the person receiving the greatest number of votes for the party nomination for an office at such primary election shall have his name placed on the ballot for the general election as the nominee of that party.

APPEAL from a judgment of the circuit court for Ashland county: CHESTER A. FOWLER, Judge. *Affirmed.*

Upon the verified petition of the relators an alternative writ of *mandamus* was issued by the circuit court for Ashland county, September 25, 1906, commanding the defendant, as clerk of that county, to place upon the official ballot to be used at the general election to be held in that county November 6,

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1906, as the candidate of the Democratic party for the office of district attorney in that county the name of the relator *Allan T. Pray,* and as the candidate of the Democratic party for the office of county treasurer of said county the name of the relator *George W. Dopp,* or show cause to the contrary before said court October 1, 1906, and make due return to the writ. The defendant having made return to the writ, and a motion to quash the alternative writ of *mandamus* having been denied, and a demurrer to the petition and alternative writ on the ground that the same stated no facts sufficient to constitute a cause of action having been overruled, the trial court, on the undisputed and admitted facts, on October 4, 1906, adjudged, in effect, that a peremptory writ of *mandamus* be and the same was thereby awarded to the relators against the defendant, commanding him to place the names of the said relators upon the said official ballot; that is to say, the name of the said *Allan T. Pray* as the candidate of the Democratic party for the office of district attorney of said county, and the name of *George W. Dopp* as the candidate of the Democratic party for the office of county treasurer of said county, and for costs. From such judgment entered therein and the whole thereof the defendant appeals.

For the appellant there was a brief signed by *M. E. Dillon,* attorney, and *W. M. Tomkins,* of counsel, and oral argument by *F. T. Tucker.*

For the respondent there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *A. T. Pray.*

Cassoday, C. J. The facts are undisputed. The relators were both Democrats, but no Democratic candidate had been nominated for the office of district attorney of Ashland county prior to the primary election held September 4, 1906, and no Democratic candidate had been nominated for the office of county treasurer of that county prior to that date. Neither of the relators had, at the time of said election, filed

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nomination papers entitling him to have his name printed on any official ballot used at the primary election, and neither of their names was printed on any official ballot at the time of such election. There were printed on the official primary ballot of the Democratic party used at such election the names of candidates for the several state offices and for representative in Congress and member of assembly, but no name was printed on said ballot for any county office, except for the offices of sheriff and register of deeds. There was printed, however, on the official primary ballot of the Republican party, used at such election, the names of two or more candidates for the respective offices of county treasurer and district attorney. On September 13, 1906, the county board of canvassers, consisting of the county clerk, the defendant in this action, and two supervisors, one of whom was a Republican and the other a Democrat, certified "that the foregoing and *within tabular statement is correct and true,* as compiled from the original returns made to the county clerk of said county and as compared therewith by us."

It appears from such "tabular statement," on the back of such certificate and forming a part thereof, that forty-six votes were cast for the office of county treasurer, but twenty-seven of them were rejected by said board for the only reason suggested that they were cast for persons whose names, respectively, had not been *printed* on the "official primary ballot of the Democratic party," but had been written in thereon by the respective persons casting such votes; that among the twenty-seven votes so rejected were twenty-two, each having the name of *Mr. Dopp* written in thereon as the Democratic candidate for county treasurer. The other nineteen names so written in on such primary Democratic ballot were cast for two different persons, one receiving eleven votes and the other eight votes, and were counted by the board as "given for county treasurer on the Democratic ticket," because, as claimed, each of such two persons had filed nomination papers as candidates for county treasurer on some other

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official primary ballot than that of the Democratic party, and their respective names were printed on such other primary ballot. Thus, it appears that *Mr. Dopp* had a large plurality of the votes for county treasurer appearing on the primary Democratic ballot in writing.

So it appears from such "tabular statement" that forty-five votes were cast for the office of district attorney, but thirty-two of them were rejected by the board for the only reason suggested that they were cast for persons whose names, respectively, had not been *printed* on the "official primary ballot of the Democratic party," but had been written in thereon by the respective persons casting such votes; that among the thirty-two votes so rejected were twenty-six, each having the name of *Allan T. Pray* written in thereon as the Democratic candidate for district attorney. The other thirteen names so written in on such primary Democratic ballot were cast for three different persons, and were counted by the board as "given for district attorney on the Democratic ticket," because, as claimed, each of such three persons had filed nomination papers as a candidate for district attorney on some other official primary ballot than that of the Democratic party, and their respective names were printed on such other primary ballot.

The question recurs whether, upon the facts thus certified to be "correct and true" by the "board of county canvassers," the relators are entitled to have their names placed upon the official ballot to be used at the general election to be held in the county of Ashland November 6, 1906, as candidates of the Democratic party for the offices, respectively, of district attorney and county treasurer of that county. Did the fact that neither of them filed nomination papers entitling them to have their names printed on the official primary election ballot preclude voters from voting for them at the primary election September 4, 1906? Where, as here, a voter receives his package of primary ballots and selects the one which purports to be his own party ticket, but, upon inspection, finds

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that for one office there is no printed name upon the ballot, does the primary act preclude him from voting for some person in his own party? Subd. 3, sec. 12, ch. 451, Laws of 1903. Or, is he precluded from voting at all unless he votes for some person whose name is printed on the primary ballot of some other party which he is trying to beat? Id. In other words, is it the purpose of the primary election law to secure to each voter the right of free choice in the selection of candidates, or is it the purpose to build up or tear down political parties?

The act declares that the provisions of the statutes previously in force in relation to holding and conducting elections, counting the ballots and making returns thereof, and all other kindred subjects, should apply to all primaries in so far as they were consistent with the act. Secs. 12, 16, 20, 25, ch. 451, Laws of 1903. That required the board of county canvassers to make, as they did, a succinct tabular statement of the votes cast at such primary election for each office voted for, whether canvassed or not, and to certify such statement to be correct. Secs. 83, 84, Stats. 1898. It is true the act only provides for the printing upon the official ballot to be used at such primary election the names of all candidates for the respective offices for whom nomination papers had been duly filed. Sec. 9, ch. 451, Laws of 1903. The same section declares that such official ballot shall be printed "in the form provided herein and annexed hereto." The form of ballot so prescribed, after giving direction as to the manner of voting "for a person whose name *is printed* on the ballot," declares that, "to vote for a person whose name is *not printed* on the ballot, *write or paste* his name in blank space provided for that purpose." This is substantially the same as prescribed by the statute in the case of general elections, which, as we have seen, is made applicable to the primary election, wherein it is declared:

"But any voter may write upon his ballot the name of any person for whom he desires to vote for any office, in such

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place or so designated as to indicate the office, and such vote shall be counted the same as if printed upon the ballot and marked by the voter." Sec. 41, Stats. 1898.

In obedience to such requirements, twenty-two of the voters of Ashland county wrote in on the Democratic ticket the name of *Mr. Dopp* for the office of county treasurer, giving him double the number of votes of any other person whose name was so written in on that ticket for that office. And so, in obedience to the same requirements, twenty-six of the voters of that county wrote in on the Democratic ticket the name of *Allan T. Pray* for the office of district attorney, giving him a majority of all the votes so written in on that ticket for that office.

Another section of the act declares:

"If any elector write upon his ticket the name of any person who is a candidate for the same office upon some other ticket than that upon which his name is so written, this ballot shall be counted for such person only as a candidate of the party upon whose ticket the name is written, and shall in no case be counted for such person as a candidate upon any other ticket." Subd. 3, sec. 12, ch. 451, Laws of 1903.

It is then provided therein that, in case the same person is nominated upon more than one ticket, he shall designate upon which his name shall be printed on the official ballot. Id.

Another provision of the act in question declares:

"The person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election." Subd. 1, sec. 18, ch. 451, Laws of 1903.

This provision certainly means what it says; and so the words, "the greatest number of votes at a primary," necessarily include the votes for persons whose names are not printed on any ballot but are written in on the primary ballot of his party, as well as those that are written in and also printed on the ballot of some other party. And this seems to be in harmony with the purpose of the act, as indicated in

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its title, which is "An act to provide for party nominations *by direct vote.*" The trial court properly held, in effect, that it appears upon the face of the act that voters of a party have the right to write in upon the primary election ballot the name of their choice as the party candidate for any office, and that such vote should be counted; and that the person receiving the greatest number of votes for an office at such primary election should be the candidate of his party and have his name put on the ballot for the general election.

By the Court.—The judgment of the circuit court is affirmed.

THE STATE EX REL. RINDER VS. GOFF, County Clerk.

October 16—November 7, 1906

Supreme court: Original jurisdiction, when and how exercised: Primary elections: Right to have name on official ballot: **Mandamus:** ***Prospective official duties: Certificate of election as nominated candidate: Rights of holder: Canvassing board.***

1. Questions of title to local public office, or of performance of local official duty, though *publici juris*, are not ordinarily questions "affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people," and only in very exceptional cases will the supreme court entertain them in the exercise of its original jurisdiction.
2. But serious abstract questions as to the construction of the primary election law and the rights of one holding a regularly issued certificate of nomination, affecting the operation of the law throughout the entire state, may properly be considered as questions affecting the prerogatives of the state and the liberties of the whole people, even though they arise in a controversy as to the right to a place on the official ballot as the party nominee for a local office; and the court may properly exercise its original jurisdiction in such a case, especially where the time between the primary and the general election is so short that no authoritative decision could be reached through the exercise of the appellate jurisdiction.

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3. In such a case the court declines to entertain an action in equity and determine therein which person in fact received the greater number of legal votes, but directs the issuance of an alternative writ of *mandamus* for the purpose of determining only the duty of the county clerk upon the record before him as to the printing of the official ballot.
4. Although *mandamus* will not generally be available in advance of the time when the official duty in question is to be performed, yet in extreme cases the writ may issue to control the performance of prospective duties. No other remedy being available, such a case is *held* to exist as to the duty of a county clerk with respect to printing relator's name on the official ballot, where the clerk had already made his determination and might legally act at once, but was not required by law to act until some three weeks later, only four days before the election, and the writ if delayed until that time would be fruitless.
5. Under the general statutes (secs. 81–88, Stats. 1898) making the execution of certificates of election a part of the county canvass, and secs. 16, 25, ch. 451, Laws of 1903, making the provisions of those statutes applicable to primary elections, a certificate of election should be issued by the county clerk to a candidate nominated for a county office at a primary election.
6. When the vote at a primary election has been canvassed by the proper board and the proper certificate of election has been executed, the person receiving such certificate is at once in possession of the *quasi* office of nominated candidate, and has the right to have his name put on the official ballot, as against all the world, until in some proper proceeding (as by *quo warranto*) it is decided that another person was in fact nominated. No subsequent voluntary action of the canvassing board (as in recanvassing the vote and granting a certificate to another) can deprive him of his *prima facie* right to such *quasi* office.

MANDAMUS to the County Clerk of Dane County. *Peremptory writ issued.*

At the opening of court on the 9th day of October, 1906, application was made to the court by the attorney general, on the sworn complaint or relation of *Christian F. Rinder,* for leave to commence an action in equity in this court to enjoin the defendant, as county clerk of Dane county, from printing the name of one W. S. Packard as Republican candidate for county treasurer of said county upon the official ballot for the general election in November following, and to

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command him to print the name of the relator as such candidate upon such ballot. The proposed complaint or relation, after stating the official character of the defendant and the fact of the holding of a general primary election under the primary law, September 4, 1906, alleged, in substance, that the relator and W. S. Packard and one Roloff were candidates upon the primary ballot for the Republican nomination for county treasurer of said county at said primary election; that in the Third ward of the city of Madison (being one of the election precincts in said county) the relator actually received eighty-three votes, Packard forty-nine votes, and Roloff twenty-seven votes, and that the precinct inspectors so counted and announced the result and that the same so appeared upon the written tally sheet provided by the secretary of state for the purpose of computing the result, but that the inspectors, in making their written statement of the result required by the statute, by mistake certified that Packard had received eighty-three votes, Roloff forty-nine votes, and *Rinder* twenty-seven votes, and that said statement and tally sheet, as well as the ballots cast, were duly returned in a sealed package to the county clerk; that a like mistake of five votes was made in the town of Middleton, another election precinct of the county; that the county board of canvassers of said county met on September 7th following and canvassed the votes, and determined and certified, among other things, that *Rinder* had received 2,007 votes and Packard 2,000 votes at said primary, and adjourned *sine die;* that on September 19th following, the defendant, as county clerk, issued and delivered to the relator a certificate of his election as Republican candidate for county treasurer, which relator still holds; that afterwards, on September 24th, said canvassing board pretended to meet again to take further action, and passed a resolution reciting that the board had canvassed the tally sheets instead of the inspectors' certificates, that there was a discrepancy between the tally sheets and the certificates

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of the inspectors, that the tally sheets show the nomination of *Rinder* and the certificates the nomination of Packard, and resolving that the certificate theretofore issued to *Rinder* be rescinded and that a certificate of election be issued to Packard, in accordance with the inspectors' certificates; that the defendant declares and threatens that he will print the name of Packard upon the official ballot and not the name of *Rinder;* that *Rinder* actually received the greater number of votes; and that the relator has no other remedy in the premises unless this court entertain the action. A temporary injunctional order was also prayed for and an ancillary writ of *certiorari* directing the defendant to certify to this court the original returns and ballots.

The court took this application under advisement, and on the 10th day of October denied the application for leave to commence an action in equity, but directed that an alternative writ of *mandamus* issue, returnable forthwith, commanding the defendant to place *Rinder's* name on the official ballot or show cause to the contrary. An ancillary writ of *certiorari* to bring up the records and ballots had previously been issued as prayed in the original relation, and the said records had been returned when the alternative writ of *mandamus* was issued.

The defendant made return to the alternative writ on October 12th, admitting the holding of the primary election, the candidacy of *Rinder* and Packard, the discrepancy between the tally sheets and the certificates from the precincts in question, the canvass of the returns by the county canvassing board, and that "said canvassing board computed the number of votes received for said *Rinder* and said Packard from the tally sheets in the first instance, with the result as alleged in said complaint." The return further admits that the board re-assembled and corrected their mistake, and determined, upon the inspectors' certificates, that Packard had received a majority of the votes, and alleges that on the 24th of Septem-

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ber, 1906, he executed and delivered a certificate of nomination to Packard, which Packard still has. The return further alleges that the recount was made on advice of counsel, that Packard claims to have actually received the greater number of votes, and admits that, unless otherwise directed, he will cause Packard's name to be printed on the official ballot, and prays that the action be dismissed.

Afterwards, and before argument of the cause, both parties appeared in court by their counsel and applied for an order appointing commissioners to count the ballots actually cast. This application was also taken under advisement, and on October 15th was denied, and the following statement of the reasons for such denial was filed:

PER CURIAM. Serious questions as to the construction of the primary law and the duties of executive officers thereunder may properly be considered as questions affecting the prerogatives of the state and the liberties of the whole people, and on that account this court may properly consider them in the exercise of its original jurisdiction, because the decision of such questions necessarily prescribes a rule of conduct for all election officers in the state, though the case in which they arise may affect only the nomination for a local office. Especially should this be so held in view of the fact that an authoritative decision of such questions could rarely be reached through the exercise of the appellate jurisdiction, on account of the shortness of the time between the primary election and the general election, when the question must be tested, if tested at all. But a controversy as to who received the most votes at a primary election for the nomination for a local office, not involving any construction of the primary law itself, is not a question affecting prerogatives of the state or liberties of the people, so as to call for the exercise of the original jurisdiction of this court. In the *Rinder Case* the question whether the certificate issued to *Rinder* or the one afterwards issued to Pack-

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ard by the canvassing board is controlling upon the county clerk in printing the ballots is considered a question within the original jurisdiction of this court; but this court will not go into the question as to which candidate received the most votes, either by counting the ballots or by taking other testimony. The court will confine itself to the question as to the duty of the county clerk under the primary law in view of the action of the canvassing board.

On the 16th day of October the relator moved to quash the return, and the case was argued by counsel and taken under advisement.

For the relator there was a brief signed by *Tenney, Hall & Tenney* and *Rufus B. Smith,* and the cause was argued orally by *Mr. F. W. Hall* and *Mr. Smith.* To the point that the county board of canvassers, having met pursuant to law and canvassed the returns and declared that *Rinder* had received the most votes for nomination as county treasurer, and having issued to him the certificate of his nomination, has no power to reconvene at a later date and annul the certificate and issue another to Packard, they cited McCrary, Elections (4th ed.) §§ 267–269; *Bowen v. Hixon,* 45 Mo. 340; *Gooding v. Wilson,* Dig. Elec. Cases in Congress (1871–1876) 79; *State ex rel. Biggs v. Churchill,* 15 Minn. 455; *Clark v. Buchanan,* 2 Minn. 346; *Rice v. Board of Canvassers,* 50 Kan. 149; *Rosenthal v. State Board of Canvassers,* 50 Kan. 129; *Crouse v. Nixon,* 65 Kan. 843; *State ex rel. Att'y Gen. v. Donnewirth,* 21 Ohio St. 216, 220; *State ex rel. Ingerson v. Berry,* 14 Ohio St. 315; *In re Hearst,* 183 N. Y. 274, 76 N. E. 28; *Smith v. Lawrence,* 2 S. Dak. 185, 49 N. W. 7; *Crowell v. Lambert,* 10 Minn. 369, 375; *Att'y Gen. v. Board of Co. Canvassers,* 64 Mich. 607, 611, 31 N. W. 539. The tally sheets may be considered. *State ex rel. Welty v. McFadden,* 46 Neb. 668, 65 N. W. 800.

Ernest N. Warner, for the defendant, contended, *inter alia,*

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that the county board of canvassers had no authority under the statute to compute the number of votes cast for county treasurer except upon the certificates of the inspectors of election. Had it been discovered that they were following any other rule, this court would by *mandamus* have compelled them to make their canvass from such certificates. Sec. 16, ch. 451, Laws of 1893; secs. 76, 81 *et seq.* Stats. 1898; *Att'y Gen. ex rel. Carpenter v. Ely,* 4 Wis. 420; *Att'y Gen. ex rel. Bashford v. Barstow,* 4 Wis. 567. The court will go behind the returns. *State ex rel. Burnett v. Pierpont,* 29 Wis. 608; *State ex rel. Field v. Avery,* 14 Wis. 122; *State ex rel. Guernsey v. Meilike,* 81 Wis. 574. If the board had not corrected its error the court would direct the county clerk to print Packard's name on the ballot, as upon the record he is clearly the nominee. *People ex rel. Smith v. Pease,* 27 N. Y. 45; *People ex rel. Eastman v. Seaman,* 5 Denio, 409; *People ex rel. Yates v. Ferguson,* 8 Cow. 102; *People ex rel. Van Voast v. Van Slyck,* 4 Cow. 297; *People ex rel. Benton v. Vail,* 20 Wend. 12; *Rex v. Vice-Chancellor,* 3 Burr. 1647.

On October 18th judgment was rendered quashing the return and adjudging that the peremptory writ of *mandamus* issue. The following opinion was filed November 7, 1906:

WINSLOW, J. The importance of this case, as being the first case involving the construction of the new primary election law (ch. 451, Laws of 1903), was fully appreciated by this court from its inception. It was manifest at once that, if any remedy were to be given, it must be given quickly if it were to be effective. At the same time it was realized that the importance of the questions involved imperatively demanded deliberate and well-considered, rather than hasty, action. The court has made an earnest effort to meet these requirements, and it is the office of this opinion to make clear, if possible, the grounds upon which the several orders and the final judgment are based.

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The three separate grants of jurisdiction made by sec. 3, art. VII, Const., are now well understood. They are appellate jurisdiction, which enables this court to revise finally the decisions of inferior courts in all litigation brought to it by appeal or proper appellate writ; superintending jurisdiction, for the purpose of controlling the course of ordinary litigation in all inferior courts when such courts overstep their jurisdiction or refuse to act within it and there is no other adequate remedy; and original jurisdiction, to protect the general interests and welfare of the state and its people, which is exercised by the use of the prerogative and *quasi*-prerogative writs named or referred to in the section. *Att'y Gen. v. Blossom,* 1 Wis. 317; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 611, 79 N. W. 1081; *State ex rel. Cook v. Houser,* 122 Wis. 534, 100 N. W. 964. It is well settled, also, that this original jurisdiction was not given to this court for the primary purpose of enabling it to entertain and decide mere private or local questions, of which the circuit court has full jurisdiction, but to make it a court of first resort on all judicial questions "affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *Att'y Gen. v. Railroad Cos., supra.* This principle is important, and has been frequently acted upon by this court by refusing to exercise its original jurisdiction in cases involving mere private or local interests. Indeed, were it to be overlooked and the doors opened to ordinary actions, even of great importance, it seems very certain that the volume of such business would be so great as to seriously hamper, if not overwhelm, the court in its effort to perform its other constitutional duties. *In re Mielke,* 120 Wis. 501, 98 N. W. 245.

The present application, as at first made, was an application for the exercise of the last-named jurisdiction, by means of mandatory as well as restraining injunction in an action in equity, and our attention was first directed to the question whether the matters involved were such as could be properly

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said to affect the sovereignty of the state, its franchises or prerogatives, or the liberties of its people. Questions of the title to local public office, or of performance of local official duty, though *publici juris,* are not ordinarily such questions, and only in very exceptional cases will this court entertain them in the exercise of its original jurisdiction. *Att'y Gen. v. Eau Claire,* 37 Wis. 400; *State ex rel. Wood v. Baker,* 38 Wis. 71; *State ex rel. Cash v. Juneau Co.* 38 Wis. 554; *State ex rel. Radl v. Shaughnessey,* 86 Wis. 646, 57 N. W. 1105; *In re Holland,* 107 Wis. 178, 83 N. W. 319. The ordinary jurisdiction of the circuit court is ample for such cases. It did not seem that any exceptionally important circumstance or fact was present here. The bare question whether the name of *Mr. Rinder* or Mr. Packard should be placed on the official ballot was largely a personal question, important to no one except the two gentlemen named. In any event some person presumably competent would be chosen treasurer, and the public business would be transacted without perceptible difference, or, if there was any disturbance in the public business, it would concern only the affairs of one municipality. It was manifestly an entirely different question from that involved in the case of *State ex rel. Cook v. Houser,* 122 Wis. 534, 100 N. W. 964, where the question was as to the placing of the names of an entire ticket for state officers upon the official ballot, thus probably affecting governmental policies as well as business, and hence deemed to seriously affect the liberties of the people. Thus it seemed to us certain that the question whether *Mr. Rinder* or Mr. Packard received the greater number of votes at the primaries was clearly not within the lines which have been laid down within which this court will exercise its original jurisdiction.

It appeared, however, by the relation that abstract questions were involved concerning the proper construction of the new primary election law and the rights of one holding a regularly issued certificate of nomination, and as to such ques-

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tions there were very different considerations. The primary election law was a new and important law, operative in every election precinct and county of the state, making a radical change in the conduct of all general and municipal elections, and creating a new office or *quasi* office, namely, the office of nominated candidate. Although this new office or right was one of very short duration and carried but one privilege, namely, the privilege of having the name printed properly on the official ballot, nevertheless the right was important. Evidently any serious abstract question as to the proper construction of the law clearly affected not only the local candidates between whom it might arise, but also the operation of the law throughout the entire state. Furthermore, the time within which such a question must be tested, if at all, was so brief that it would be rarely possible (except by consent) to obtain a decision thereon in a trial court and review thereof by this court before the right would be lost and a decision fruitless. These persuasive considerations impelled us to the conclusion that the court ought to exercise its original jurisdiction for the purpose of determining such questions, for the reason that they were not merely questions of local interest or local official duty, but concerned the duty of all election officers in the state, and so affected the sovereignty of the state and the liberties of the whole people.

But, if original jurisdiction were to be assumed for this purpose, the question then presented itself whether the question as to whether *Rinder* or Packard actually received the more votes, though a mere local controversy, should not be also entertained and decided, as ancillary to the main question. The proposed action was an action in equity, and the proposed complaint alleged that *Rinder* in fact received the greater number of votes. This allegation might well be put in issue. No reason was perceived why, if the action were allowed to proceed as an action in equity, Packard should not be interpleaded for his own protection, and be entitled to

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plead and prove that he himself received the greater number of votes, and thus convert the action substantially into an election contest over a nomination for a local office. If this were to be done for one it should be done for all in a similar situation, and thus the court would in effect become a tribunal for the settlement of all contests over primary nominations for all offices, state or local, or, in other words, an appellate canvassing board for the entire state. The considerations before mentioned, and which must be apparent to all, forbade such a course, and thus we reached the conclusion that, while we would entertain and decide an important question as to the construction of the primary law and the duties of local officials thereunder, we would not entertain or decide the question as to which of two candidates for nomination for a local office received the greater number of votes. We therefore declined to entertain the action in equity, which would necessarily open up the whole field as to the conduct of the election, the legality of the votes cast, and the number cast for each, and directed simply the issuance of an alternative writ of *mandamus,* not for the purpose of settling an election contest, for *mandamus* is not so used, but only to determine the duty of the county clerk upon the record before him as to the printing of the official ballot. By this course it seemed certain that the questions over which this court should assume original jurisdiction would be clearly presented, without embarrassment from the presence of other issues and claims not germane to the question of the proper construction of the primary law.

In so holding we are not unmindful of the general principle laid down in *State ex rel. Board of Ed. v. Hunter,* 111 Wis. 582, 87 N. W. 485, that *mandamus* will not generally be available in advance of the time when a duty is to be performed, nor of the fact that the county clerk is not required by law to print the official ballots until four days before the general election, and hence that no duty would be actually due

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at the time of the issuance of the alternative writ. But it was recognized in that case that extreme cases might well arise demanding the use of *mandamus* to control the performance of prospective duties, and it seemed to us that this was just such a case. The act to be controlled here was necessarily required to be done within a little more than three weeks, and it might legally be performed at once. Under the allegations of the proposed complaint or relation the county clerk had already made his determination and was threatening to carry it out. There was no provision for a recount of the ballots by any board or officer, except in an action of *quo warranto* or other proper proceeding to contest an election; no such action or contest being then pending or practically possible within the limited available time. Sec. 80, Stats. 1898, as amended by ch. 287, Laws of 1905. If the relator's position was correct, the county clerk was about to disobey the law, eliminate the relator's name from the official ballot, and effectually destroy his right to have his name go before the people as a candidate. Moreover, if the writ were delayed until four days before election it would be fruitless. No hearing or judgment could then be obtained in time to be of any use. Under these circumstances we found little difficulty in reaching the conclusion that an exceptional case was made, justifying, and even requiring, the use of the writ to control prospective action on the part of a public officer. For the reasons given the court refused to entertain an action in equity which would be substantially an action to contest the election, and ordered the issuance of its alternative writ of *mandamus* to determine simply the duty of the county clerk upon the record before him, and for the same reasons the court refused the subsequent application to count the ballots.

Upon the allegations of the relation, the writ, and the return, there is no substantial contest as to the facts. The election inspectors, according to a well-known custom, returned the tally sheets which had been furnished them, with their cer-

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tified statements of results, to the county clerk. The tally sheets in two precincts did not agree with the certified statements, and the difference was such that if the tally sheet results were accepted *Rinder* was nominated, and if the certified statements were accepted Packard was nominated. The county board of canvassers duly met, canvassed the returns, discovered the discrepancies, and accepted the tally sheet results in the two precincts, declared *Rinder* nominated, and adjourned *sine die*. The county clerk issued and delivered a certificate of election to *Rinder*. Some days afterwards the board of canvassers, upon advice of counsel and of their own motion, reconvened, assumed to recanvass the vote, accepting the certified statements instead of the tally sheets, resolved that their former action be rescinded, and declared Packard nominated, and the clerk issued a certificate of election to Packard. Upon these admitted facts, in view of the absence of any statutory provision for recount of the ballots except in an election contest, and in view of the absence of contest and the apparent impossibility of the prosecution and determination of such a contest within the time available for such purpose, what name should the county clerk place upon the official ballot? This is the question presented by the motion to quash the return, and its determination requires, in the first place, consideration of the provisions of the primary election law which govern the canvass of votes. Upon this subject the law does not purport to contain a complete system of procedure, but attempts to adopt the methods provided by law for the canvass of the returns of the general election in November. Sec. 16 (ch. 451, Laws of 1903, as amended) provides that the canvass of votes shall, except as therein otherwise provided, be made in the same manner and by the same officers as the canvass of an election. It further provides, after prescribing the duties of precinct canvassers, that the "county canvass . . . shall be made by the same officers and in the manner provided in ch. 5, Stats. 1898, for the canvass

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of the returns of a November election." Sec. 25 further provides:

"The provisions of the statutes now in force in relation to the holding of elections, the solicitation of voters at the polls, the challenging of votes, the manner of conducting elections, of counting the ballots and making return thereof, *and all other kindred subjects,* shall apply to all primaries in so far as they are consistent with this act, the intent of this act being to place the primary under the regulation and protection of the laws now in force as to elections."

The intention to import into the primary law all provisions of the general laws relative to the canvassing of the returns, not inconsistent with special provisions of the primary law, cannot be mistaken. Turning to the general statutes we find that the subject of the county canvass is covered by secs. 81 to 88, inclusive, Stats. 1898. Sec. 81 provides for the meeting of the board and of whom it shall be composed; sec. 82 provides for the opening of the returns and the procurement of amended returns in case of informalities or defects; secs. 83 and 84 provide for the actual canvass, the determination of results, the making of a certified statement of such results, and the publication thereof; sec. 85 requires the clerk to immediately make out a certificate of election for each successful candidate and deliver the same to him on application; secs. 86 and 87 provide for the making of duplicate statements as to other than county officers; and sec. 88 provides for the canvass of the returns upon a proposed constitutional amendment or other question submitted to the people. These are the provisions governing the county canvass of the returns of a November election, and the primary law says that the canvass of the returns of the primary election shall be made by the same officers and in the same manner; and, further, that the provisions of the general statutes relating to the conduct of elections, the counting of ballots, the making of returns, and *all other* kindred subjects shall apply to primary elections. Is the execution and delivery of a certificate of election to the

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successful candidate one of the provisions thus imported into the primary law? The county clerk so construed the law in the present instance, and we think rightly. We think it quite clear, from inspection of the general statutes, that the legislature regarded the execution of the certificate of election as an integral part of the county canvass. The section providing for it is included within the subdivision of ch. 5, Stats. 1898, which bears the heading "County Canvass." The execution of the certificate is an act which might well be done by the whole board, and in many jurisdictions is so done; but even though not required to be done by the whole board, it is required to be done by the county clerk, who is, when able to act, required to be a member of the board. It is also required to be done *immediately* upon the execution of the certified statement of results and apparently as the necessary final act attendant upon that result. As we have seen, the necessary effect of the primary law is to give an official character and standing to a man who has received the plurality of the votes of his party at a primary election. It may not be strictly accurate to call him a public officer, but the law gives him a certain and definite legal standing and endows him with at least one valuable privilege or right which he may enforce. Until the time of the election he is guaranteed, and in fact holds, a recognized legal position, which may be called, in default of a better term, a *quasi* office, namely, that of a nominated candidate. The giving of a certificate of election to a man who has received the necessary plurality at a primary election, upon the determination of that fact by the proper board, is entirely logical; in fact, just as logical as the giving of a certificate of election to a man who has received the majority of the votes for an ordinary office. His rights under it are not so valuable and last a shorter time, but they are substantial. In view, therefore, of the provisions of the general statutes which make the execution of the certificate a part of the county canvass, and the very sweeping sections which in-

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corporate these provisions into the primary law, we conclude that the law contemplates the execution of a certificate of election to the duly nominated primary candidate.

From this conclusion it naturally follows that such a certificate must be given like effect, so far as the rights of a nominated candidate are concerned, as a certificate of election to an ordinary office. This court has held that one who has been declared by the proper canvassing board to have been elected to an office, and has received the proper certificate of election and duly qualified, is entitled to the possession of the office and its property and emoluments as against all the world except a *de facto* officer already in possession under color of authority, and that this right persists until a different result is reached in a *quo warranto* action or other proper proceeding to contest the right of the certificate holder. *State ex rel. Jones v. Oates,* 86 Wis. 634, 57 N. W. 296; *State ex rel. McCoale v. Kersten,* 118 Wis. 287, 95 N. W. 120. If this principle be applied to the present case, and we see no reason why it should not be so applied, it is decisive in favor of *Rinder's* right to have his name placed upon the ticket. No act of qualification is required of a candidate nominated at a primary election. So, when the vote has been canvassed by the proper board and he has received his certificate, he is at once in possession of his *quasi* office so far as any one can be in possession of it, and entitled to its single privilege, namely, the right to have his name put on the official ballot in the proper place, as against all the world, until in some proper action or proceeding to contest his right it is decided that another person was in fact nominated. It is not necessary now to decide what action might be brought to contest his *prima facie* right. No reason is perceived why *quo warranto* proceedings would not be the proper remedy; but it is sufficient to say that no action of any kind has been brought or is pending to test the relator's *prima facie* title. Nor is it seen how any voluntary action of the canvassing board in coming together

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again and attempting to rescind their former action and bestow the title to the office upon another can affect the relator's *prima facie* title to the *quasi* office of which he was in possession. It would hardly be claimed for a moment that the incumbent of an ordinary office, who had qualified and taken possession of it under a certificate of election, could be ousted of his right by a resolution passed at a second meeting of the canvassing board. He is not a party to the proceedings of the canvassing board, nor can such proceedings be called an action or proceedings to contest an election. We are not now attempting to decide whether the canvassing board had any power to re-assemble and make a second canvass, or whether they could be compelled to do so by *mandamus*. These are questions concerning which there is some conflict in the decisions. 15 Cyc. 383, 384, and notes 89–91. We simply hold that, where a canvass has been made and a certificate issued, the certificate holder cannot be deprived of his *prima facie* right to the office by any subsequent action of the canvassing board. His right must be contested and set aside in a proper action or proceeding brought for the purpose, and until this has been done *mandamus* will lie to place him in possession of the property and privileges of the office to which he has *prima facie* title. These considerations seem to us to demonstrate that the peremptory writ of *mandamus* should issue, requiring the county clerk to place the name of the relator upon the official ballot.

Before closing this opinion it seems not improper to say that the present case must serve to bring sharply to attention the fact that there is no provision made in the primary law for the speedy settlement of contests arising over primary elections. The frequency with which such questions are liable to arise is apparent, and the practical impossibility of settling them by means of ordinary processes of law in the courts, by reason of the very limited time within which they must be settled, seems equally apparent. It would seem the

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part of legislative wisdom to provide some tribunal clothed with the power to entertain and finally decide in a speedy manner all such questions; otherwise, there is certainly danger of rights being lost and injustice done simply because no remedy is provided.

By the Court.—The demurrer to the return is sustained, and the peremptory writ of *mandamus* is adjudged to issue as prayed in the relation. The *certiorari* proceedings are dismissed, without costs.

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2. Even prior to the enactment of ch. 419, Laws of 1905, an order appointing commissioners in drainage proceedings was not "a final order affecting a substantial right" within the meaning of subd. 2, sec. 3069, Stats. 1898, and was therefore not appealable. *Ibid.*

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3. In proceedings for the organization of a drainage district the court, under sec. 1379—18, Stats. 1898, as amended by ch. 43, Laws of 1901, refused to confirm the report of the commissioners and condemned the drainage system proposed by them on the ground that it would impair the navigability of a river and destroy a lake, but refused to dismiss the proceedings, for the reason that it was not shown that there was no other way, not open to such objections, of effecting the drainage in question. *Held*, that the order was "a final order affecting a substantial right," and therefore appealable under subd. 2, sec. 3069, Stats. 1898. *In re Dancy Drainage District*, 129

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5. Where it is not assigned as error that the findings of the trial court are not supported by the evidence, the supreme court is warranted in not considering that question. *My Laundry Co. v. Schmeling*, 597

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6. Exceptions merely enumerated in an appellant's brief, but not deemed worthy of specific consideration by counsel, will not be considered. *Roedler v. C., M. & St. P. R. Co.* 270

7. Generally an assignment of error without any attempt to support it by argument in the brief or orally will not be considered on appeal. *My Laundry Co. v. Schmeling*, 597

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8. Where in justice's court the answer was held to contain a sufficient denial of plaintiff's claim and the evidence thereunder was received without objection, and upon appeal the circuit court treated the answer as sufficient or as having been amended to conform to the evidence, it will be so treated upon appeal to the supreme court. *Donner v. Genz*, 245

9. Refusal to allow a proper amendment of an answer was not a prejudicial error, where evidence was admitted as though the amendment had been made; and on appeal it will be deemed to have been made. *Seifen v. Racine*, 343

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10. The decision of the trial court as to whether matter is admissible in evidence as a part of the *res gestæ* is to be treated as correct unless manifestly wrong. *Johnson v. State*, 146

11. Where a deed was in evidence and is referred to, but not included, in the bill of exceptions, a finding of the trial court that by such deed the grantee assumed payment of a certain mortgage on the land as a part of the consideration for the conveyance will be presumed to be correct. *Patterson v. Cappon*, 439

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12. The rule that findings of fact by the circuit court will not be disturbed on appeal to the supreme court unless they are against the clear preponderance of the evidence is applicable to a case determined in the circuit court upon the record of a justice of the peace before whom the original trial was had. Nothing in sec. 3769, Stats. 1898, conflicts with that rule. *Fintel v. Cook*, 88 Wis. 485, explained. *Donner v. Genz*, 245

13. Although findings in a special verdict may be against a clear preponderance of the evidence, they will not be disturbed on appeal if the evidence, considered in the light most favorable to the successful party which it will legitimately bear, is sufficient to sustain them. *Roedler v. C., M. & St. P. R. Co.* 270

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14. Error in the admission of evidence is immaterial where, even without such evidence, the findings of the trial court are abundantly supported. *Boyle v. Robinson*, 567

15. In an action to restrain the violation of a contract, the exclusion of certain evidence offered to show that the clause alleged to have been violated had been included in the contract by fraud is *held* not to have been harmful error, in view of the evidence which was admitted and of the findings of the court. *My Laundry Co. v. Schmeling*, 597

No appearance by respondent: Reversal: Effect.

16. Where the plaintiff is appellant and files a brief, if there is no appearance by the respondent this court, on appellant's motion, will reverse the judgment or order appealed from with the same effect as if the appeal had been heard and all questions raised by the appellant decided in his favor on the merits. *Oma v. Wilkinson*, 119

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17. Refusal of the circuit court to dismiss for want of prosecution, under sec. 4038, Stats. 1898, an appeal from county court which had been pending about five years, is *held* not to have been an abuse of discretion, it appearing that said time had been largely consumed in litigation of other cognate matters proper to be settled before proceeding with the appeal, and in negotiations for settlement, and that there had been destruction of papers and other matters, all tending to show that the delay was not unreasonable. *Parsons v. Balson*, 311

18. A petition asking that an order admitting a destroyed will to probate be set aside because of the failure of the guardian *ad litem* of petitioner (an infant heir of the testator) to call the court's attention to undisputed facts showing revocation of the will, was denied by the county court. *Held*, that on appeal the circuit court properly allowed an amendment of the petition, setting up the claim of the petitioner as an after-born child and asking that an order assigning the real estate in accordance with the will be also set aside. *Ibid.*

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19. No appeal from the last-mentioned order was necessary in such a case, since it must fall if the probate of the will should be set aside. *Ibid.*

20. On appeal from a county court to the circuit court, an undertaking conforming strictly to sec. 4032, Stats. 1898, and approved as to form, amount, and sufficiency of sureties by the county court, was sufficient to give the circuit court jurisdiction, although it did not run "to the judge of the county court" for the security and benefit of all persons interested, under sec. 4013. *Zahorka v. Geith,* 498

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1. In a bastardy proceeding paternity cannot be established beyond reasonable doubt against the defendant if it appears that the prosecutrix had intercourse with another man at a time consistent with the latter's responsibility for the pregnancy. A clear preponderance of the evidence in this case is *held* to establish such intercourse. *Busse v. State,* 171

2. A conviction by the court without a jury in a bastardy proceeding will be reversed if contrary to a clear and definite preponderance of the evidence. *Ibid.*

BILL OF EXCEPTIONS. See APPEAL, 11. CRIMINAL LAW, 4.

BILL OF PARTICULARS. See GAMING, 4.

BILLS AND NOTES.

Execution: Signature in representative capacity: Parol evidence.

1. A note read: "Four months after date the Northwestern Straw Works promise to pay," etc., and was signed

"The Northwestern Straw Works,
"E. R. Stillman, Treas.
"John W. Mariner."

Mariner was the secretary of the corporation, duly authorized to sign notes on its behalf. *Held:*

(1) The signature of Mariner was not "so placed" on the instrument as to make it doubtful in what capacity he intended to

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sign, within the meaning of subd. 6, sec. 1675—17, of the Negotiable Instrument Law (ch. 356, Laws of 1899), providing that a person whose signature is so placed is to be deemed an indorser.

(2) It appearing from the instrument itself that Mariner placed his signature thereon as maker, either individually or in a representative capacity, sec. 1677—3 does not apply.

(3) Whether the note itself showed that Mariner signed on behalf of the corporation and is therefore not personally liable thereon, under sec. 1675—20, not determined.

(4) If sec. 1675—20 does not apply, the note was ambiguous upon its face as to Mariner, and parol evidence that he signed merely in his representative capacity and as agent for the corporation was admissible, even as against a *bona fide* purchaser of the note for value before its maturity. *Germania Nat. Bank v. Mariner*, 544

Notes executed by wife with husband. See MARRIED WOMEN, 1, 2.

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2. The evidence in this case is *held* not to show that a note was executed under duress, but to be sufficient to take to the jury the question whether its execution was induced by false and fraudulent representations. *Hodge v. Wallace*, 84

Maturity upon default in payment of interest: Rights of transferee.

3. A note providing expressly that delinquency in payment of any interest "shall cause the whole note to immediately become due and collectible," becomes due in such case absolutely, not merely at the option of the holder, and one thereafter taking the note from the payee takes it subject to the equities between the original parties. *Hodge v. Wallace*, 84

Payment and discharge. See PRINCIPAL AND AGENT.

Obtaining note by false pretenses. See FALSE PRETENSES.

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Of corporation: Compelling production. See TAXATION, 19.
Text books: Illegal change. See SCHOOLS.

BOUNDARIES.

1. The grantee of a lot in a recorded plat takes title to the center of an adjoining street, subject to the public easement, even where the lot is described by metes and bounds extending to the line of the street, although without express reference to such street, and also where the lot is described as bounded by the street. *Wegge v. Madler*, 412

2. In a conveyance of part of a lot, described by metes and bounds, the expression "the northwest corner of" the lot is *held* to mean the point at the intersection of the south and east lines respectively of the two streets at the corner of the lot and not the point at the intersection of the center lines of such streets. *Ibid.*

BRIEFS. See APPEAL, 6, 7.

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BUILDING CONTRACTS

See LIENS, 4.

1. Damages which a contractor was entitled to recover from a subcontractor for delay in furnishing materials are *held* not to have been waived by the making of a later agreement between the owner and contractor providing for enlarging the building (then not completed) at an increased price and for an extension of the time for its completion, and further providing that the contractor should make certain payments in lieu of the penalty incurred for failure to complete the building on time, but making no provision as to any damages which the contractor might have sustained by reason of the delay. *Modern Steel S. Co. v. English C. Co.* 31

2. Where it was understood that, in regular course, structural iron would be needed to work into a building in the early part of a building season, a subcontractor who had agreed to furnish such iron as it might be wanted and had been expressly directed in July to furnish some of it immediately, but failed to furnish it until the latter part of November, when the building season had practically closed, was liable to the principal contractor for the damages caused by such delay, even though he had been unable sooner to obtain the iron from the manufacturers. *Ibid.*

3. Payment of a large sum by a contractor to a subcontractor under circumstances which warranted the contractor in believing that the money was accepted on the condition that his losses from delays on the part of the subcontractor would be adjusted later, did not amount to a waiver of the claim for damages on account of such delays. *Ibid.*

4. The fact that payment by a contractor to employees and subcontractors of the amounts they actually lost by reason of delays caused by another subcontractor was made without notice to the latter does not preclude the contractor from recovering such amounts as damages from the subcontractor who caused the delay, it being still open to the latter, notwithstanding the payment, to contest such claims in every respect. *Ibid.*

5. Where the inability of a contractor to complete a building at the agreed time was caused by a subcontractor's breach of his agreement to furnish material, and the contractor, in lieu of the penalty incurred, was required to pay the salary of the superintendent thenceforward until the completion of the building, the amount which he was so required to pay was a proper counterclaim against the claim of the subcontractor against him. *Ibid.*

6. A provision in a building contract that the superintendent should determine "the amount of damages which may have accrued from any cause" and that his certificate and decision should be binding and conclusive in all matters, is *held* to apply only to the owner and principal contractor and not to have become a part of a subcontractor's agreement. *Stein v. McCarthy*, 120 Wis. 288, distinguished. *Ibid.*

7. After his failure to complete a building at the agreed time, caused by a subcontractor's delay in furnishing materials, a contractor made a new agreement to construct, for an additional consideration, certain parts of the building not included in his original contract. *Held*, that he could not recover from the subcontractor for time spent in doing the new work, but only

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for time lost, by reason of the delay, in performing the work covered by the original contract. *Ibid.*

BURDEN OF PROOF. See COURTS, 2. DEEDS, 2. DRAINS, 7. TRIAL, 9. WILLS, 1.

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See DEEDS, 1, 2. REPLEVIN.

In an action to set aside a deed from a mother to a daughter, where a part of the consideration was a promise by the grantee to pay certain sums to plaintiffs, who were also children of the grantor, a judgment establishing the validity of the deed and directing payment of the agreed sums to plaintiffs was not erroneous because it made such payment conditional upon plaintiffs' paying defendant's costs and disbursements in the action, but should not have made such payment to plaintiffs conditional upon their paying defendant's expenses in connection with the action or conditional upon "the final termination of the action, by consent or otherwise, in accordance with" that judgment. *Boyle v. Robinson,* 567

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1. A finding of the trial court that one who negotiated for and obtained from defendants a transfer of their interest in the lands in suit was at the time defendants' attorney, is *held* to be sustained by the evidence. *Emerson v. McDonnell,* 67

2. After action brought by the grantees in a tax deed to bar the original owners from any interest in the lands, a purchase by defendants' attorney of his clients' interest in the lands was champertous, and the court properly struck out defenses interposed by him for his own benefit, though in the name of the defendants, and held that defendants were in default. *Ibid.*

3. Where in such case defendants' attorney had, by arrangement with plaintiffs' attorney, deposited money with the latter to redeem the lands and thus establish the title and interest which he had secured from his clients, no ratification by the plaintiffs of such arrangement would validate the champertous transfer. *Ibid.*

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CHATTEL MORTGAGES.

1. Ch. 122, Laws of 1903 (providing that whenever any property covered by a chattel mortgage shall be taken and sold under and by virtue of such mortgage pursuant to the power of sale contained therein an affidavit stating certain facts shall be

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filed within ten days after the sale, and that in case of failure to file such affidavit the debt secured by such mortgage shall be deemed fully satisfied and the mortgage canceled), affects not the remedy merely, but the right, and hence does not apply to mortgages antedating its enactment. *Hammel v. Cairnes*, 125

2. Such statute, being highly penal, should be strictly construed to hostile taking. *Ibid.*

3. Voluntary surrender of the mortgaged property by the mortgagor to the mortgagee, and sale pursuant thereto, are not such a taking and sale as the statute means, and failure to file the affidavit thereafter does not work a forfeiture. The statute refers to a hostile taking. *Ibid.*

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CONSTITUTIONAL LAW.

Distribution of govermental powers: Judicial powers and functions.

1. Ch. 21, Laws of 1905, authorizes the circuit court, in making an order creating a town, to exercise only that discretion which always rests with the trier of facts, and does not confer upon it any discretion as to the expediency or propriety of making the order when the requisite facts are found. It is therefore not invalid as vesting a legislative function in the court. *Nash v. Fries,* 120
2. That part of ch. 44, Laws of 1903, which provides that the county court, as an incident in the settlement of an estate, shall determine the value of the property inherited or bequeathed, as a basis for ascertaining the amount of the tax as fixed by the law, does not impose nonjudicial or merely administrative duties upon the court. *Nunnemacher v. State,* 190

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3. The right to transmit property by descent or by will is an inherent right protected by the constitution and, though subject to reasonable regulation, cannot be wholly taken away or substantially impaired by the legislature. *Nunnemacher v. State,* 190

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Classification of cities. See MUNICIPAL CORPORATIONS, 2.

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1. A contempt proceeding to punish the violation of a temporary injunction is a proceeding in the action in which such injunction was granted, not independent of it. *My Laundry Co. v. Schmeling,* 597
2. Under sec. 3490, Stats. 1898, in a contempt proceeding to punish a defendant who had violated a temporary injunction, although no actual loss or injury to plaintiff was shown, defendant was properly ordered to pay to plaintiff the costs and expenses incurred by the latter in prosecuting the proceeding. *Ibid.*
3. Where in such case only the amount of plaintiff's costs and expenses was ordered to be paid, the wording of the order and judgment, directing it to be paid "to indemnify plaintiff for its actual loss and injury . . . and to satisfy its costs and expenses," etc., was a harmless irregularity. *Ibid.*
4. Expenditures of the plaintiff for counsel fees are recoverable in such a proceeding, as proper items of expense. *Ibid.*

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Offer and acceptance: Authority of agent.

1. A memorandum given by defendants' buyer of furs to plaintiff, stating that he would "take up, at his selection, goods from"

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plaintiff, at certain prices and within a certain period, and a letter from plaintiff to defendants, are *held* to have constituted a contract for the purchase by defendants of furs collected by plaintiff within the period named. *Abrohams v. Revillon*, 235

2. The evidence (stated in the opinion) is *held* sufficient to sustain a finding of the jury that plaintiff was justified in believing that defendants had given the buyer authority to contract for them for furs to be gathered and delivered in the future, and a further finding that the buyer had in fact such authority. *Ibid.*

Agency of wife for husband. See HUSBAND AND WIFE.

Signature by officer of corporation. See BILLS AND NOTES, 1.

Validity of assent: Duress, fraud, etc. See APPEAL, 15. BILLS AND NOTES, 2.

Legality of object: Restraint of trade or labor. See INJUNCTION, 3–8.

3. One selling out his interest in a business may surrender, for a reasonable length of time and within reasonable limits as to territory, his liberty to engage in a competing business either as proprietor or as employee. The mere fact that such contract is in partial restraint of labor does not render it void as against public policy. *My Laundry Co. v. Schmeling*, 597

4. An agreement by the vendor of an interest in a laundry business is construed as not binding him not to engage in any kind of labor for any person engaged in the laundry business, but only as binding him not to engage in that business in any manner or capacity during the time and within the limits named. So construed the agreement is reasonable and valid. *Ibid.*

5. The reasonableness of a contract not to engage in a certain business is a matter of law to be determined from the contract itself, having regard to the limitations therein prescribed as to time and place and the purpose and scope of the restraint. *Ibid.*

6. For the protection of a business sold by him a person may partially restrict the scope of his activity whether he is a trader or not and whether or not the business sold has, as incident thereto, a good will. *Ibid.*

7. Upon a sale for a specified consideration of an interest in an entire going business, including the good will thereof, the vendor agreed that for a certain time he would not engage in that business in the same city. *Held*, that such agreement entered into and became part of the equivalent for the price paid. *Ibid.*

Same: Power of town to employ attorney. See TOWNS.

Champertous agreements. See CHAMPERTY.

Conditions precedent: Parol evidence. See EVIDENCE, 4.

Devolution of liability on successor corporation. See MUNICIPAL CORPORATIONS, 1.

Construction: Court and jury. See TRIAL, 4.

Construction of particular contracts. See BILLS AND NOTES, 3. BOUNDARIES, 2. BUILDING CONTRACTS. DEEDS, 3. INSURANCE. LIENS, 4. PRINCIPAL AND AGENT.

8. A contract executed by two husbands and their wives for the support of the wives' mother, providing that she should have the privilege of living with either family as she should elect

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and for such time as she desired, is construed as binding all the parties to furnish the support wherever the mother might choose to reside, and not as putting the whole burden upon those with whom she did reside. *Payne v. Payne*, 450

9. Pursuant to a contract with defendant to paint a portrait of his deceased wife, plaintiff was furnished with two photographs of her to aid him in the work. He painted a portrait from one of them as agreed, and was paid therefor. Without authority he also painted a portrait from the other photograph, and at defendant's request took it to his house, whereupon defendant retained the second portrait and refused to pay for it. *Held*, that the use of the photographs to paint the second portrait was a violation of the contract and a breach of trust and confidence; that plaintiff acquired no property right in such portrait; and that defendant's retention of it did not make him liable as a purchaser. DODGE, J., dissents. *Klug v. Sheriffs*, 468

[10. Whether the painting of the second portrait was an evasion of any "right of privacy," not determined.] *Ibid.*

Modification. See LANDLORD AND TENANT, 1.

Reformation. See REFORMATION OF INSTRUMENTS.

Abandonment. See LANDLORD AND TENANT, 2, 3.

Performance and breach: Actions: Damages: Contribution. See BUILDING CONTRACTS. CONTRIBUTION. DAMAGES, 3.

11. A declaration by one party to a contract that he will not perform, even if made before the time for performance has expired, is such an anticipatory breach as gives the other party a right to treat the contract as terminated. *Davidor v. Bradford*, 524

12. Upon refusal of plaintiff to carry out his part of an agreement under which defendant had purchased mining shares for their joint benefit, defendant is *held* to have had a right to surrender a part of the shares to the mining company and make a settlement with it, either to minimize his damages from such breach by plaintiff or, as a partner, to promote the best interest of the joint enterprise. *Ibid.*

13. Defendant had, in such case, a cause of action against plaintiff for breach of the contract, and also a right of action for contribution from plaintiff of one half the expense necessarily incurred in the joint enterprise. *Ibid.*

Same: Evidence: Conduct of counsel.

14. Defendants, being lessees of a store building, gave plaintiff permission to maintain a bootblacking stand on the sidewalk adjoining such building, in consideration of a sum of money then paid and monthly payments thereafter to be made. The agreement expressly stated that defendants did not in any way guarantee to plaintiff the right to keep the premises without molestation on the part of the city or other persons than themselves. *Held*, that if plaintiff was prevented from maintaining the stand by the city, by defendants' landlord, or by any person other than defendants, he was not entitled to recover back the sum paid to defendants. *Speliopoulos v. Schick*, 556

15. In an action to recover back the sum so paid plaintiff should not have been permitted to introduce in evidence a so-called permit to erect the stand, given by a city official who had no authority over the subject. *Ibid.*

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16. Plaintiff in such action having testified on the subject of his intelligent understanding of the situation before making the contract, it was error to exclude, on his cross-examination, a question as to whether before making the contract he had consulted an attorney as to his right to build the stand. *Ibid.*

17. In an action upon a contract, attempts by the plaintiff's attorney to show that plaintiff did not fully understand the contract, and to impress that as a fact upon the jury in his argument, are criticised as having been intended to invoke the sympathy of the jury and obscure the legal rights of the parties; but whether such conduct was so prejudicial as to vitiate the verdict is not determined. *Ibid.*

Same: Compelling performance. See SPECIFIC PERFORMANCE.

Same: Restraining breach. See INJUNCTION, 3–8.

CONTRIBUTION.

See CONTRACTS, 13. WITNESSES, 1.

1. Where several persons contracted to support a woman during her life, each being bound in the same degree, and one of them discharged the obligation alone, he is entitled to contribution and may enforce it in a legal action. *Payne v. Payne*, 450

2. The plaintiff in such a case may enforce his claim for contribution against any one or more of the persons liable to him for their proportionate shares, and the other persons so liable are not necessary parties to the action. *Ibid.*

3. Where in such a case defendants in the action for contribution had given a mortgage of land to secure performance of the contract for support, a third person who had afterwards purchased the land and assumed the lien of the mortgage is not a necessary party to the action, there being nothing to show that he assumed the personal liability of his grantors to contribution. *Ibid.*

4. In an action to enforce contribution from persons who had contracted jointly with plaintiff to support a certain person, evidence as to the comparative value of two pieces of land which had been conveyed to plaintiff and one of the defendants respectively in consideration of their joining in the contract, as to the health of the person supported while she lived with plaintiff, as to the value of the support which he furnished her, and as to her fear of one of the defendants, is *held* to have been material and competent. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 4, 5. RAILROADS, 1. STREET RAILWAYS, 4. TRIAL, 13.

CONVEYANCES. See APPEAL, 11. BOUNDARIES. CANCELLATION OF INSTRUMENTS. DEEDS. INDIANS. SPECIFIC PERFORMANCE. TAX TITLES. WILLS, 3–5. WITNESSES, 2, 3.

COPIES. See EVIDENCE, 3.

CORPORATIONS.
Stock: Pledge: Sale. See PLEDGES.
Officers: Signature to note. See BILLS AND NOTES, 1.
Production of books to show value of stock. See TAXATION, 19.
Exemption of property: Turner societies. See TAXATION, 6–10.
Public service corporations: Franchises: Obligation as to reasonable rates. See GAS.
Restraining acts in excess of franchises. See INJUNCTION, 1.

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COSTS.

See CANCELLATION OF INSTRUMENTS. CONTEMPT, 2, 3. NEW TRIAL.

1. In ejectment, where the sole heir of the common grantor of the parties was also brought in as a party and successfully defended by a separate attorney, she was entitled to recover full costs and disbursements, excluding such items as were common to both issues. *Wegge v. Madler*, 412
2. Entry of judgment for costs in favor of a defendant who had been served with notice that no personal claim was made against her, was a harmless irregularity where the costs taxed were no greater than they would have been had the judgment been in favor of her husband only, in whose answer she had joined. *Kaufer v. Stumpf*, 476
3. In replevin against a carrier other claimants intervened, and the judgment, among other things, discharged the carrier from liability. On appeal from the whole judgment, no error being assigned as to that portion of it, and the carrier not having appeared, the judgment is affirmed as to the carrier without costs, under the discretion given by sec. 2949, Stats. 1898. *Hurley v. Walter*, 508

COUNTERCLAIM. See BUILDING CONTRACTS, 5. JUDGMENT, 3, 4. PLEADING, 3.

COUNTY CLERK. See COURTS, 5. ELECTIONS, 2. MANDAMUS.

COUNTY COURTS.

See APPEAL, 17–20. CONSTITUTIONAL LAW, 2. TAXATION, 19.

1. The power of the county court to set aside its order or judgment is not limited to one year after notice of the entry thereof, where such order or judgment was without jurisdiction or was the result of fraud. *Parsons v. Balson*, 311
2. Failure of the guardian *ad litem* of an infant heir to oppose the probate of a will giving all the property to another, and to call the attention of the court to undisputed facts showing that the will was not entitled to probate, was a constructive fraud upon the infant, justifying vacation of the order or judgment admitting the will to probate. *Ibid.*
3. The petition to set aside the order in such a case, although it does not in terms charge fraud, is sufficient if it alleges the facts constituting the constructive fraud. *Ibid.*

COURT AND JURY. See TRIAL, 2–8.

COURTS.

Judicial or nonjudicial functions. See CONSTITUTIONAL LAW, 1, 2. GAS, 3.

Jurisdiction: Proof of mailing summons, etc. See DIVORCE, 1.

Same: Power to revoke licenses. See INTOXICATING LIQUORS, 1.

Review of action of board of review. See TAXATION, 11, 12.

Terms: Adjournments.

1. Under sec. 2572, Stats. 1898, a term of court does not come to an end upon an adjournment "subject to the order of the judge,"

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but continues until the final adjournment thereof without day or the commencement of a new term. *Cooper v. Granger*, 50

2. An order, dated on the day of the opening of a new term, recited that said day was an adjourned day of the previous term. After making the order the court adjourned *sine die*. *Held*, that it will be presumed that such adjournment took place prior to entering upon the business of the new term. *Ibid.*

Supreme court: Original jurisdiction, when and how exercised.

3. Questions of title to local public office, or of performance of local official duty, though *publici juris*, are not ordinarily questions "affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people," and only in very exceptional cases will the supreme court entertain them in the exercise of its original jurisdiction. *State ex rel. Rinder v. Goff*. 668

4. But serious abstract questions as to the construction of the primary election law and the rights of one holding a regularly issued certificate of nomination, affecting the operation of the law throughout the entire state, may properly be considered as questions affecting the prerogatives of the state and the liberties of the whole people, even though they arise in a controversy as to the right to a place on the official ballot as the party nominee for a local office; and the court may properly exercise its original jurisdiction in such a case, especially where the time between the primary and the general election is so short that no authoritative decision could be reached through the exercise of the appellate jurisdiction. *Ibid.*

5. In such a case the court declines to entertain an action in equity and determine therein which person in fact received the greater number of legal votes, but directs the issuance of an alternative writ of *mandamus* for the purpose of determining only the duty of the county clerk upon the record before him as to the printing of the official ballot. *Ibid.*

Same: Appellate jurisdiction. See APPEAL. CRIMINAL LAW, 4.

Circuit courts. See APPEAL, 17–20. CONSTITUTIONAL LAW, 1.

County courts. See COUNTY COURTS.

COVENANTS. See DEEDS, 3. PRINCIPAL AND AGENT, 4. TAX TITLES, 2.

CREDITORS' REMEDIES. See CHATTEL MORTGAGES. HUSBAND AND WIFE. LIENS. MARRIED WOMEN, 4, 5. MORTGAGES.

CRIMINAL LAW AND PRACTICE.

See FALSE PRETENSES. FORGERY. HOMICIDE. INTOXICATING LIQUORS, 2–4. PERJURY.

Evidence: Res gestæ.

1. After shooting a man during a struggle in a saloon, defendant telephoned for a doctor and thereafter remained for a time in the saloon. He then went to his room in the same building, and in a few moments left the building to go to the police station to give himself up. After walking about a third of a mile he boarded a street car, told where he wished to go, and made statements to the motorman as to what had occurred. *Held*, that the trial court properly excluded such statements as not being part of the *res gestæ*. *Johnson v. State*, 146

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Same: Reputation.

2. Evidence that defendant in a criminal case was reputed to be a man of truth and veracity was properly excluded, where no attack had been made upon his reputation in that regard. *Ibid.*

Examination of witnesses by judge.

3. The trial judge may, in the exercise of a sound discretion, examine or cross-examine a witness in a criminal case; but the power should be most carefully exercised for the purpose of making clear that which is not clear, and the questions should not betray bias or prejudice nor carry to the jury the impression that the judge has made up his mind as to the facts. *Komp v. State,* 20

Court and jury: Question of intent. See FORGERY, 3.

Appeal and error: Exceptions: Review.

4. Where in a criminal case the bill of exceptions contains no exception to any portion of the charge to the jury, and the motion for a new trial did not specifically point out objectionable portions thereof, errors assigned upon the charge are not reviewable. *Norton v. State,* 659

CROSS-EXAMINATION. See CONTRACTS, 16. CRIMINAL LAW, 3. WITNESSES, 4.

DAMAGES.

See BUILDING CONTRACTS. CONTRACTS, 12. INJUNCTION, 5, 6. LIBEL AND SLANDER, 2, 7, 11. TRIAL, 7.

1. For injuries to a man thirty-one years old, capable of earning $2.50 to $3 per day, resulting in permanent partial paralysis of his right shoulder and that part of the arm near it and total paralysis of the rest of the arm, an award of $8,000 is *held* not fatally excessive. *Howard v. Beldenville L. Co.* 98

2. In an action for personal injuries an instruction that plaintiff, if entitled to recover, was entitled to such sum as would *fully compensate* him for all the elements of damage which the court had just specifically mentioned, is *held* not erroneous by reason of the use of the word "fully." *Sorensen v. J. I. Case T. M. Co.* 366

3. The facts that, after sale of his interest in a laundry business, defendant violated his agreement not to engage in that business in the same city, that employees left the service of plaintiff and were hired by the concern with which defendant was connected, and that the places thus vacated were filled by plaintiff at increased expense, do not entitle plaintiff to recover such increased expense as damages for defendant's breach of the agreement, in the absence of evidence that such employees broke a contract in leaving plaintiff's service or that they would have remained with plaintiff for some length of time, ascertainable with reasonable certainty, if they had not been offered the opportunity to take service in the concern with which defendant was connected. *My Laundry Co. v. Schmeling,* 597

DEBTOR AND CREDITOR. See CHATTEL MORTGAGES. FALSE PRETENSES. FRAUDS, STATUTE OF. HUSBAND AND WIFE. LIENS. MARRIED WOMEN. MORTGAGES. PLEDGES. PRINCIPAL AND AGENT.

DECEIT. See BILLS AND NOTES, 2.

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DEEDS.

See APPEAL, 11. BOUNDARIES. CANCELLATION OF INSTRUMENTS. TAX TITLES. WITNESSES, 2, 3.

Competency of grantor: Undue influence: Burden of proof.

1. In an action to set aside a deed and a transfer of personalty by an aged woman to a daughter to the exclusion of her children by a former husband, the evidence (sufficiently stated in the opinion) is *held* to sustain findings of the trial court that the grantor was mentally competent and that there was no undue influence. *Boyle v. Robinson,* 567
2. Plaintiffs' evidence in such case is *held* not to have constituted such a *prima facie* showing of fraud or undue influence as to have put the burden of proof upon the defendant. *Ibid.*

Construction: Payment of taxes.

3. Where a conveyance of lands contained a reservation of timber thereon with the right to remove it, and provided that the grantor should "pay all taxes upon the lands . . . until it shall give a written release of said timber," the grantor was bound to pay only such taxes as, prior to the giving of the release, had become liens upon the land by extension on the tax roll and delivery of the warrant for collection. *Sniveley v. Keystone L. Co.* 54

DEFAULT. See CHAMPERTY, 2. JUDGMENT, 1, 2.

DEFINITIONS. See WORDS AND PHRASES.

DEGREES of crime. See HOMICIDE.

DELAY. See APPEAL, 17. BUILDING CONTRACTS. PROCESS.

DELEGATION OF POWER. See CONSTITUTIONAL LAW, 1, 2. INTOXICATING LIQUORS, 1.

DESCENT AND DISTRIBUTION: Inheritance taxes. See CONSTITUTIONAL LAW, 2, 3. TAXATION, 16–19.

DESCRIPTION of land. See BOUNDARIES, 2. SPECIFIC PERFORMANCE, 2.

DISCRETION. See APPEAL, 17, 18. CONSTITUTIONAL LAW, 1. PLEADING, 2. TRIAL, 1, 9. WITNESSES, 4.

DITCHES. See DRAINS, 3–9.

DIVORCE.

1. In an action for divorce, where the mailing of copies of the summons and complaint to defendant had been ordered, the mere fact that an affidavit showing such mailing was not on file did not deprive the court of jurisdiction to order judgment of divorce, where copies had in fact been mailed as ordered and an affidavit showing that fact was subsequently filed. *Zahorka v. Geith,* 498
2. Where, at the close of the trial of an action for divorce, judgment was "ordered for plaintiff and against defendant," and nothing further was to be done except for the clerk to enter judgment in obedience to such direction, but the clerk failed to perform such duty, a judgment of divorce ordered and entered fourteen years later, *nunc pro tunc* as of the date of said first order for judgment, was binding and effectual in dissolving the marriage as of said date. *Ibid.*

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DRAINS.

Appealable orders in drainage proceedings. See APPEAL, 1-3.

Drainage districts: Impairing navigability of waters.

1. Secs. 1379—11 to 1379—31, Stats. 1898, relating to the organization and powers of drainage districts, do not authorize the destruction of a navigable lake or the impairment of the navigability of a river. *In re Dancy Drainage District,* 129
2. Remonstrants against the work proposed by the commissioners, under said statutes, may make the objection that such work will impair the navigability of a river or destroy a lake. *Ibid.*

Town drains: Jurisdiction of supervisors: Essential proceedings.

3. Under the statutes relating to town drains (secs. 1359-1371, Stats. 1898) the supervisors constitute a special tribunal for administrative purposes, not proceeding according to the course of the common law, and exact compliance in all substantial matters with the statutory procedure is essential to their jurisdiction. *Fraser v. Mulany,* 377
4. If, by noncompliance with the statute, the supervisors lose jurisdiction, their proceeding and determination are wholly void and may be attacked collaterally or directly. *Ibid.*
5. Failure to give notice of the first hearing as required by sec. 1360, Stats. 1898, is fatal to the jurisdiction, even though there is an affidavit of the service of notice. *Ibid.*
6. Under secs. 1363, 1364, Stats. 1898, a determination by the supervisors of the question of damages to lands through which the ditch runs is an essential preliminary to an apportionment of the total cost of construction upon the lands to be benefited. *Ibid.*
7. Where the ditch crosses a highway the supervisors must, under sec. 1363, Stats. 1898, before assessing the cost to the lands to be benefited, consider and determine whether such highway will be benefited and, if so, the amount of such benefit; but there is no presumption that the supervisors did not perform that duty from the mere absence of an assessment against the town on account of such a benefit. *Ibid.*
8. Arbitrary or fraudulent omission of lands directly benefited or inclusion of lands not at all benefited renders void the assessment of the cost of constructing the ditch. *Ibid.*
9. The recording of the order awarding damages to the owner of land, as required by sec. 1363, Stats. 1898, and of the final certificate of assessment required by sec. 1364, is essential to the validity of subsequent proceedings. *Ibid.*

Same: Restraining proceedings. See INJUNCTION, 2.

DURESS. See BILLS AND NOTES, 2.

EJECTMENT. See COSTS, 1.

ELECTIONS.

Primary elections: Ballots: Written names.

1. Under the primary election law (ch. 451, Laws of 1903) the voters of a party may write in upon the primary election ballot the name of any person as their choice for the party nominee for any office, and such votes shall be counted; and the person re-

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ceiving the greatest number of votes for the party nomination for an office at such primary election shall have his name placed on the ballot for the general election as the nominee of that party. *State ex rel. Pray v. Yankee,* 662

Same: County canvass: Certificates of election.

2. Under the general statutes (secs. 81–88, Stats. 1898) making the execution of certificates of election a part of the county canvass, and secs. 16, 25, ch. 451, Laws of 1903, making the provisions of those statutes applicable to primary elections, a certificate of election should be issued by the county clerk to a candidate nominated for a county office at a primary election. *State ex rel. Rinder v. Goff,* 668

3. When the vote at a primary election has been canvassed by the proper board and the proper certificate of election has been executed, the person receiving such certificate is at once in possession of the *quasi* office of nominated candidate, and has the right to have his name put on the official ballot, as against all the world, until in some proper proceeding (as by *quo warranto*) it is decided that another person was in fact nominated. No subsequent voluntary action of the canvassing board (as in recanvassing the vote and granting a certificate to another) can deprive him of his *prima facie* right to such *quasi* office. *Ibid.*

Remedies in courts: Jurisdiction, etc. See COURTS, 3–5. MANDAMUS.

ELECTRICITY.

1. A high degree of watchfulness for the prevention of accidents is imposed upon persons using electric currents, and such watchfulness should take into account the acts of strangers and of the public generally. *Wilbert v. Sheboygan L., P. & R. Co.* 1

2. A wire which has been attached by a stranger to a tree for the purpose of holding it upright was fastened at the other end to a guy post in such a way as to be in contact with the guy wire of an electric light pole. It became charged with a current escaping through a defective insulator from the electric lamp to the span wire and thence to the guy wire, and plaintiff's intestate was killed by coming in contact with the tree wire while it was so charged. Upon the evidence it is *held* that the jury were warranted in finding that these defective conditions had existed for such a length of time that the lighting company ought to have discovered and remedied them before the accident. *Ibid.*

3. The existence of the tree wire was not such an extraordinary and unusual condition that it can be said as a matter of law that it was not reasonably to have been apprehended in the conduct of the company's business. *Ibid.*

EQUITY. See CANCELLATION OF INSTRUMENTS. CONTRIBUTION. COURTS, 5. INFANTS. INJUNCTION. LIENS. MORTGAGES. MUNICIPAL CORPORATIONS, 5. REFORMATION OF INSTRUMENTS. REPLEVIN. SCHOOLS, 2. SPECIFIC PERFORMANCE. TRUSTS.

ESTATES OF DECEDENTS. See APPEAL, 17–20. CONSTITUTIONAL LAW, 2, 3. INFANTS. MARRIED WOMEN, 4. TAXATION, 16–19. WILLS.

ESTOPPEL. See MARRIED WOMEN, 1, 2. MORTGAGES, 1.

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EVIDENCE.

Presumptions. See COURTS, 2. DRAINS, 7. TRIAL, 9. WILLS, 1, 2.

Burden of proof. See DEEDS, 2.

Relevancy, materiality, and competency. See CONTRACTS, 15, 16. CONTRIBUTION, 4. INJUNCTION, 7, 8. INTOXICATING LIQUORS, 2, 3. LIBEL AND SLANDER, 7–12. PERJURY, 3.

1. When one party gives in evidence a portion of a conversation material to the controversy, the other party may give the whole thereof, at least so far as it has any relation to the portion already offered. *Earley v. Winn,* 291

Same: Res gestæ. See APPEAL, 10. CRIMINAL LAW, 1.

2. To be admissible as part of the *res gestæ*, a statement of the accused must have been an undesigned incident of the act in question, so near to and so connected with that act as to indicate its character. *Johnson v. State,* 146

Same: Reputation. See CRIMINAL LAW, 2. LIBEL AND SLANDER, 7–9.

Best and secondary evidence: Copies.

3. A verified copy of a paper is not necessarily receivable in evidence merely because the original is beyond the jurisdiction of the court. There should be, at least, some fair showing of efforts to obtain the use of the original, unless it is clear that they would have been fruitless. *Bruger v. Princeton & St. M. Mut. F. Ins. Co.* 281

Admissions. See TRIALS, 3.

Hearsay. See LIBEL AND SLANDER, 10, 11.

Parol evidence affecting writings. See BILLS AND NOTES, 1 (4).

4. Parol evidence is admissible to show that a written contract not under seal, though manually delivered, was not to become a binding or valid contract until the performance of some condition precedent, even though the written instrument itself enumerates other conditions precedent to its becoming operative and taking effect, where such written conditions are not repugnant to the one sought to be shown by parol. *Golden v. Meier,* 14

Weight and sufficiency. See GAMING, 2, 3. INSURANCE, 3. LIENS, 2. NEGLIGENCE, 2, 5. OFFICERS, 1. PERJURY, 1, 2. TRIAL, 3. TRUSTS.

Same: Positive and negative testimony. See RAILROADS, 2.

Order of proof: Rebuttal. See TRIAL, 1.

Witnesses: Competency, examination, impeachment, etc. See WITNESSES.

Immaterial errors in admission or exclusion of evidence. See APPEAL, 14, 15.

EXCEPTIONS AND BILL OF EXCEPTIONS. See APPEAL, 8, 9, 11. CRIMINAL LAW, 4.

EXCISE LAWS. See INTOXICATING LIQUORS.

EXCISE TAXES. See TAXATION, 1–5, 16–19.

EXECUTION of instruments. See BILLS AND NOTES, 1, 2.

EXECUTORS AND ADMINISTRATORS. See APPEAL, 17–20. INFANTS. MARRIED WOMEN, 4. WILLS, 4, 5.

EXEMPTIONS from taxation. See TAXATION, 6–10, 18.

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FALSE PRETENSES.

1. A promissory note is within the meaning of the words "other property" in sec. 4423, Stats. 1898, making criminal the obtaining by false pretenses of "money, goods, wares, merchandise, or other property." *Clawson v. State.* 650

2. The offense of obtaining property by false pretenses was not committed if the property obtained was only such as the accused was legally entitled to receive, even though he obtained it by means of falsehood. In such a case two essentials of the offense, viz., an intent to defraud and an actual fraud committed, are lacking. *Ibid.*

3. The evidence in this case is *held* to show that at the time defendant obtained from one H. a promissory note for $500 he was entitled to demand and receive from H. that amount of money as a commission for finding a purchaser for a vessel, and hence that in obtaining such note defendant was not guilty of the offense of obtaining property by false pretenses. *Ibid.*

FEES of attorneys. See CONTEMPT, 4.

FELLOW-SERVANTS. See MASTER AND SERVANT, 1.

FINDINGS OF FACT. See APPEAL, 12, 13.

FIRE INSURANCE. See INSURANCE.

FORECLOSURE OF MORTGAGES. See MORTGAGES, 3, 4.

FORFEITURES. See CHATTEL MORTGAGES, 2. PHYSICIANS AND SURGEONS, 3.

FORGERY.

1. A check falsely made with intent to defraud and apparently sufficient on its face is a forgery, even though other steps (such as indorsement by the payee) would be necessary, if it were genuine, to perfect it in the hands of the accused. *Norton v. State,* 659

2. A check payable to the order of the payee may be transferred without his indorsement and hence cannot be said not to be the subject of forgery by another person because without value in his hands. *Ibid.*

3. The question of defendant's intent to defraud in falsely making a check is *held,* upon the evidence in this case, to have been one for the jury. *Ibid.*

FORMER CONVICTION. See INTOXICATING LIQUORS, 2, 3.

FRANCHISES. See GAS, 1. INJUNCTION, 1.

FRAUD. See APPEAL, 15. COUNTY COURTS. DEEDS, 1, 2. MORTGAGES, 3. REPLEVIN, 2.

FRAUDS, STATUTE OF.

1. A promise in form to guarantee payment of the debt of another, but in fact to pay the promisor's own debt, is not within the statute. *Kaufer v. Stumpf,* 476

2. An oral agreement between the parties that plaintiff should advance moneys to buy land at a foreclosure sale, take the title in his own name, and transfer it to defendant upon the latter reimbursing him, and that defendant should reimburse him for

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the advances, such agreement being executed by plaintiff to the extent of purchasing at the sale, was within the statute of frauds (sec. 2302, Stats. 1898) and void. *Ibid.*

3. Defendant's oral promise in such case to repay plaintiff's advances being void, his subsequent oral promise, in consideration of a transfer of the land to his brother, to indorse his brother's note for said advances and to pay such note, was not a promise to pay his own debt, but a collateral promise to pay the debt of another, and hence void under sec. 2307, Stats. 1898. *Ibid.*

4. Where a complaint alleged that defendant agreed to indorse a note of J. S., and agreed to pay it in consideration of a transfer of land to J. S., defendant may, without pleading it, rely upon the statute of frauds (sec. 2307, Stats. 1898) declaring void an oral promise to answer for the debt of another. *Ibid.*

FRAUDULENT REPRESENTATIONS. See BILLS AND NOTES, 2.

FUTURE INTERESTS in land: Mortgaging. See INFANTS.

FUTURE SUFFERING. See TRIAL, 7.

GAMING.

1. In an action under sec. 4532, Stats. 1898, the complaint alleged loss of money to defendants at roulette, but the evidence showed its loss at another game. There was no objection to the evidence on that ground, and the case was tried throughout as if the particular means by which the money was lost was not material. *Held*, that the variance was waived and that on appeal, so far as necessary to sustain the judgment, the complaint will be treated as amended. *Clark v. Slaughter*, 642

2. Evidence *held* sufficient to take the case to the jury on the question whether defendants were the winners of plaintiff's money, although there was no direct evidence that the persons who attended the table at which it was lost were employees of defendants. *Ibid.*

3. Evidence as to the amount of money lost by plaintiff, though not very certain as to the precise amount lost on each occasion and not wholly consistent, is *held* sufficiently definite to enable the jury to name a sum which, to a reasonable certainty, was lost as claimed. *Ibid.*

4. The complaint contained a bill of particulars of specified sums lost on specified dates, but the case was tried and evidence of losses given, without objection, as if there were no bill of particulars. *Held*, that the variance was waived and that the verdict for plaintiff was not excessive merely because not limited to proven items from the bill of particulars. *Ibid.*

GAS.

1. In the absence of legislative restriction of the rate to be charged, the grant of a franchise to conduct the business of furnishing gas to a city and its inhabitants carries with it by implication the obligation to furnish it at a reasonable price. *Madison v. Madison G. & E. Co.* 249

2. The rates to be charged by a public service corporation may be prescribed by the legislature either directly or by delegation of

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the power to municipal corporations or other appropriate agencies, provided the rates so fixed are such as to afford a reasonable compensation for the service rendered. *Ibid.*

3. Courts cannot prescribe the rates to be charged by public service corporations for future services, but may inquire and determine whether rates fixed by legislative authority are reasonable or unreasonable. *Ibid.*

GOOD WILL. See CONTRACTS, 6.

GUARANTY. See FRAUDS, STATUTE OF, 1.

GUARDIAN AND WARD.

1. The fact that the mother of minors had at one time, while the wife of their father, been unfaithful to her marriage vow, is *held*, in view of other facts, not sufficient of itself to render her unfit to be their guardian. *Guardianship of Tank*, 629

2. Although the request of the parent having the custody of minor children as to their guardianship after his death should be given weight by the courts, it will not necessarily control in determining the question of suitableness as between the person so designated and the surviving parent. *Ibid.*

GUARDIANS AD LITEM. See COUNTY COURTS, 2, 3.

HIGHWAYS. See DRAINS, 7. MUNICIPAL CORPORATIONS, 6, 7.

HOMICIDE.

See CRIMINAL LAW, 1.

1. Evidence tending to show, among other things, that after an altercation with the deceased in a saloon, during which the lie was passed, defendant left the room in anger and quickly returned with a revolver, with which during a struggle with the deceased, who was trying to prevent him from using it, he shot the deceased three times, is *held* sufficient to sustain a conviction of murder in the second degree under sec. 4339, Stats. 1898, involving a finding that the act was one "evincing a depraved mind, regardless of human life." *Johnson v. State*, 146

2. The wilful shooting of a person with fatal effect, though done in the heat of passion and without design to effect death, cannot be deemed an "involuntary killing" within the meaning of sec. 4362, Stats. 1898, defining manslaughter in the fourth degree. The term *involuntary* signifies inadvertence. *Schlect v. State*, 75 Wis. 486, criticised. *Ibid.*

3. The term "heat of passion" defined and an instruction relating thereto *held* erroneous. *Ibid.*

HUSBAND AND WIFE.

See COSTS, 2. DIVORCE. MARRIED WOMEN. WITNESSES, 1.

1. A set of "Stoddard's Lectures" is *held* not to have been necessaries for which, if purchased by the wife on the husband's credit, he was bound to pay. *Shuman v. Steinel*, 422

2. When a wife contracts an indebtedness on her own credit, the mere promise of the husband to pay it stands upon the same

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footing as any other promise without consideration to pay the debt of another. The act of the wife in such a case is not capable of ratification. *Ibid.*

3. But if a wife, assuming to act as her husband's agent, contracts an indebtedness and he subsequently, with knowledge of the facts, adopts her act as his own by promising to pay the debt, or by accepting the benefit of the transaction, or in any other way, he thereby becomes liable for the debt. *Ibid.*

4. So, if a wife, assuming to act as her husband's agent, signed his name to an agreement to take and pay for a set of books and he afterwards adopted her act, the contract became his from the beginning; and proof of such facts did not constitute a variance from a complaint alleging that the husband contracted for the books. *Ibid.*

5. Evidence that in such a case the husband stated that if his wife ordered the books he would pay for them at the rate of about $10 per month, and that the vendor's representative assented to such condition of payment, was sufficient to take the question of ratification to the jury. *Ibid.*

IMPEACHMENT. See WITNESSES, 5.

INDIANS.

The patent of lands allotted to an Indian pursuant to the treaty of September 30, 1854, provided that he should not alienate them in any manner without the consent of the President. Rules approved by the President provided that the net proceeds of timber sold from such lands should be deposited in some national bank subject to the check of the Indian owner, countersigned by the United States Indian agent. A contract, made under said rules, for the sale of timber from the allotted lands provided for payment of the purchase price to the Indian agent in trust for the owner. *Held* that, although the Indian owner had by the act of Congress of February 8, 1887, become a citizen of the United States and emancipated from federal control, his power to dispose of the proceeds of the timber was still subject to the approval of the Indian agent, and hence that an assignment thereof without such approval was invalid. *Tomkins v. Campbell,* 93

INFANTS.

See GUARDIAN AND WARD. MASTER AND SERVANT, 5. NEGLIGENCE, 5.

1. Pursuant to a power given by a will executors had mortgaged land for the purpose of improving it so that it would produce an income sufficient for the support of the testator's son W. After the death of W. the land went to testator's son P. for life, with remainder to his lawful issue. There being then no available means for payment of the mortgage, it was proper for the court, under ch. 300, Laws of 1899, in order to protect the interest of an infant daughter of the son P., to authorize another mortgage to pay off the first. *Lueft v. Lueft,* 534

2. It was proper also in such case for the court, in order to protect the infant's interest, to direct payment of delinquent taxes on the land out of the money raised by the second mortgage, notwithstanding the duty of the life tenant to pay such taxes. *Ibid.*

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3. The fact that the executors had exceeded their trust in applying more than the net income to the support of W. was not material in the proceeding to authorize the giving of the second mortgage. *Ibid.*

INHERITANCE TAXES. See CONSTITUTIONAL LAW, 2, 3. TAXATION, 16–19.

INJUNCTION.

Acts which may be restrained: Parties.

1. Acts in excess and abuse of corporate franchises and privileges, resulting in private injuries, may be restrained at the suit of private parties. *Madison v. Madison G. & E. Co.* 249

Same: Adequacy of legal relief. See SCHOOLS, 2.

2. Where invalid proceedings to establish a drain across lands constitute a cloud upon the title or a threatened permanent injury to the land, the owner may maintain a suit in equity to have the proceedings declared void and further steps therein enjoined. The remedy by appeal from the determination of the supervisors or by *certiorari* is not adequate in such a case. *Fraser v. Mulany,* 377

Same: Pleading: Restraint of trade, etc.

3. In an action by the purchaser of an interest in a business to restrain the vendor from violating an agreement not to engage in the same kind of business in the same city, a complaint alleging that, contrary to such agreement, the vendor has engaged in such business by associating himself with others therein, and that the inevitable result of such connection, if it be permitted to continue, will be a large diminution in the value of the good will of the business purchased by plaintiff, sufficiently alleges that the restraint prayed for is necessary to the protection of the plaintiff's business. *My Laundry Co. v. Schmeling,* 597

4. When a person sells out his interest in an established business and agrees not to enter into the same kind of business or be concerned in it in competition with that so sold, by necessary implication such agreement is material to the protection of such business. *Ibid.*

5. An action to restrain the violation of such an agreement may be maintained if there has been an actual breach thereof which, unless restrained, will cause injury to plaintiff of a nature not remediable adequately at law; and it is not essential that actual injury should have been caused before the action is commenced. *Ibid.*

Awarding damages accruing during litigation.

6. In an equitable action, upon the establishment of plaintiff's right to have the defendant restrained from violating his agreement not to engage in a certain business, the court may, in order to do complete justice in the matter and render unnecessary a resort to an action at law, award damages on account of a violation of said agreement during the litigation. *Ibid.*

Evidence: Materiality.

7. Defendant having violated his contract not to engage in the laundry business as an employee or otherwise, in an action to restrain such violation his purpose in going to work in a laundry was not material. *Ibid.*

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8. Evidence in such a case that defendant was dependent for a livelihood upon work in or about a laundry, was not admissible to show that the contract was unreasonable. *Ibid.*

Temporary injunction: Sufficiency of complaint.

9. A motion to vacate a temporary injunction challenges the sufficiency of the complaint. *Harley v. Lindemann,* 514

Same: Extent of restraint. See MUNICIPAL CORPORATIONS, 5.

Same: Violation: Punishment. See CONTEMPT.

INSTRUCTIONS TO JURY. See DAMAGES, 2. LIBEL AND SLANDER, 13. NEGLIGENCE, 1, 3, 4. RAILROADS, 2. TRIAL, 5–8.

INSURANCE.

Contract prevails over inconsistent by-laws.

1. In the absence of statutory prohibition or some rule of public policy to the contrary, a contract of insurance, whether made with a mutual or other company, will prevail over provisions in the articles of organization or by-laws of the insurer inconsistent therewith. *Bruger v. Princeton & St. M. Mut. F. Ins. Co.* 281

Fire insurance: Notice of existing insurance.

2. The question whether, when an insurance policy was issued, the company was notified of existing insurance on the property, is *held,* on the evidence, to have been properly one for the jury. *Ibid.*

Same: Value of property destroyed: Instructions.

3. Sworn proofs of loss were received in evidence, and plaintiff testified that the statements therein as to the value of the personal property destroyed were correct. There was no objection to this evidence on the ground that it was not directed to market value, and no cross-examination showing that it was not so directed. *Held,* that this evidence was sufficient to take the case to the jury on the question of value. *Ibid.*

4. An instruction to the jury as to the proportion which plaintiff could recover of the value of certain provisions is *held* not prejudicially erroneous. *Ibid.*

Life insurance: Holding policy in trust. See TRUSTS AND TRUSTEES.

Insurance agents: Contracts with company. See MORTGAGES, 2. PRINCIPAL AND AGENT, 1–5.

Interest in casualty company as basis for challenge. See JURY

INTENT. See FORGERY, 3. INJUNCTION, 7.

INTEREST: Default in payment. See BILLS AND NOTES, 3.

INTERVENTION. See REPLEVIN.

INTOXICATING LIQUORS.

Revocation of licenses.

1. The Milwaukee city charter (subd. 1, sec. 3, ch. IV), giving to the common council power to "license, regulate, and restrain" those engaged in the business of selling liquor, does not by implication empower the council to provide by ordinance how licenses to sell liquor may be revoked or to confer power to revoke

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them upon a court. The general laws on that subject (secs. 1558, 1559, Stats. 1898), enacted by the same legislature as was the charter provision, apply to all municipalities and are exclusive. *State ex rel. Sepic v. Milwaukee,* 562

Sale without license: Second conviction during year: Evidence.

2. Under a complaint charging sale of liquor without a license, but not alleging a former conviction, evidence was not admissible to show such a conviction for the purpose of subjecting the accused to the heavier punishment imposed by statute in case of a second conviction during any year. *Paetz v. State,* 174

3. The admission of such evidence, when offered by the state in making its case, cannot be justified on the ground that it tended to affect the credibility of the accused as a witness, he then not having testified; and his subsequent testimony, on cross-examination, as to such former conviction did not cure or waive the error. *Ibid.*

4. The words "during any year" in sec. 1550, Stats. 1898 (providing for the punishment in case of a second conviction of the same person during any year), mean during the ensuing period of 365 days after the date of the first conviction. *Ibid.*

JUDGMENT.

When may be ordered: Proof of service not filed. See DIVORCE, 1.

By default: Vacating.

1. Upon a motion to vacate a default judgment and permit a defense to be interposed it is essential that it should appear, from the proposed answer and the whole case made, that the claim of the defendant is meritorious. *Kremer v. Sponholz,* 549

2. The truth of the allegations of the proposed answer in such a case may properly be tested by the proofs produced on the motion, to the extent of determining whether, in any reasonable probability, the claim of the defendant can be established on a trial; and if there is no such probability the answer, though meritorious in mere words, may be condemned as unmeritorious in fact. *Ibid.*

On trial of issues: Verdict and findings: Immaterial error.

3. Where in an action on contract facts properly pleadable as a defense at law were so pleaded and were also pleaded as an equitable counterclaim for rescission, and trial of the legal issue resulted in a general verdict for plaintiff, there was no material error in granting a motion for judgment on the verdict before formally disposing of the counterclaim by findings against the defendant. *Bruger v. Princeton & St. M. Mut. F. Ins. Co.* 281

Same: Conformity to pleadings.

4. A judgment in favor of defendant *held* not erroneous whether considered as based upon counterclaim or upon an offer made in the complaint. *Davidor v. Bradford,* 524

Same: Directing payments on condition. See CANCELLATION OF INSTRUMENTS.

Personal judgment, when not proper. See LIENS, 1. MORTGAGES, 4.

Entry of judgment: Nunc pro tunc. See DIVORCE, 2.

Setting aside or vacating. See COUNTY COURTS.

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Reversal on appeal. See APPEAL, *Affirmance and reversal.*

Conclusiveness of adjudication. See TAX TITLES, 2.

5. A judgment against the validity of the summary removal of a policeman from office, rendered in *certiorari* proceedings wherein no question as to his original appointment was considered, does not render the validity of such appointment *res judicata. Seifen v. Racine,* 343

JUDICIAL POWERS AND FUNCTIONS. See CONSTITUTIONAL LAW, 1, 2. GAS, 3.

JURISDICTION. See COUNTY COURTS, 1. COURTS, 3, 4. DIVORCE, 1. DRAINS, 3-9. TAXATION, 11, 12.

JURY.

Right to jury trial. See REPLEVIN, 1.

Examination of jurors: Interest in casualty company.

In an action for personal injuries plaintiff's attorney may examine jurors as to their interest in any casualty insurance company as a basis for challenges; but this should be done only in the ordinary way, by proper questions to the jurors, and not as if anything of a peculiar nature were involved therein. No foundation need be laid for such examination, and it is not necessary or proper to require defendant's attorney or his nonprofessional assistant to submit to a private examination as to whether he represents any such insurance company concerned in the action. *Howard v. Beldenville L. Co.* 98

JUSTICES' COURTS. See APPEAL, 8, 12.

LABOR: Contracts in restraint of. See CONTRACTS, 3-7.

LAKES. See APPEAL, 3. DRAINS, 1, 2.

LAND CONTRACT. See SPECIFIC PERFORMANCE, 2.

LANDLORD AND TENANT.

See CONTRACTS, 14.

Lease: Modification by oral agreement.

1. An oral agreement, made some months after the execution of a written lease, relating to the making by the lessor of certain specific repairs in the leased building is *held* to have been separate from and independent of the lease and not to have altered or modified a provision therein that the lessee should make all necessary repairs inside the premises. *Auer v. Vahl,* 635

Same: Abandonment: Failure to make repairs.

2. Where the lessee expressly covenanted to make all necessary repairs inside of the leased premises, he cannot justify an abandonment of the lease and refusal to pay rent on the ground of the lessor's failure to make such repairs. *Ibid.*

Same: Surrender: Acceptance.

3. Before the expiration of their term lessees of a mill told the lessor that they would have to give up the mill, and he replied that they could do so if they would get a man as good as they were. They said they would try, but paid no rent thereafter, and thereupon surrendered the premises to the lessor, who ac-

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cepted such surrender and immediately took full and exclusive possession. *Held*, that the lease was thereby terminated and the lessees relieved from further payment of rent. *West Concord Milling Co. v. Hosmer*, 8

LEGISLATIVE POWER: Delegation. See CONSTITUTIONAL LAW, 1. GAS, 3.

LIBEL AND SLANDER.

Actionable statements: Newspaper article and picture

1. A newspaper article falsely stating that a person is a suicide fiend, has attempted suicide twenty-five times, and would usually go to the hospital and ask to be pumped out, is libelous as tending to bring that person into public contempt and ridicule. *Wandt v. Hearst's Chicago American*, 419
2. Where a picture of plaintiff was inserted in such an article in such a way as to be in effect a statement that it was a picture of the person referred to, the article and picture together constituted an actionable libel, although the article gave as the name of the person referred to a name other than plaintiff's and although plaintiff may not have been damaged in the estimation of friends who knew her well. *Ibid.*

Same: Spoken words charging crime: "Infamous punishment."

3. Spoken words falsely charging an indictable crime involving moral turpitude or which would subject the person charged to an infamous punishment are actionable *per se*. *Earley v. Winn*, 291
4. Imprisonment in the county jail is "an infamous punishment," within the meaning of the above rule, and, an assault and battery being so punishable, spoken words falsely charging that crime are actionable *per se*. *Ibid.*

Meaning of words spoken: Court and jury.

5. Defendant was alleged to have said to plaintiff in the presence of others: "Shame, shame, B. W., whipping your mother! She abuses her mother, and this isn't the first time either." *Held*, that these words, besides asserting that plaintiff had just been whipping her mother, were capable of being understood as asserting that there had been other like abuse on previous occasions, and that the question whether they had that meaning to the hearers should have been left to the jury. *Ibid.*

Separate slanders: Pleading: Evidence.

6. A complaint alleged the speaking of certain defamatory words in the presence of certain persons and, a few minutes later, at another place, the speaking of other defamatory words, and that "said false and defamatory words were maliciously spoken" in the presence of certain persons named "and divers other persons and at divers other times and places." *Held*, that the words last quoted did not constitute a charge of distinct slanders at other times and places and to other persons, and that, to warrant the admission of evidence of such other statements as separate and independent slanders and not merely as bearing upon the question of malice, they should have been pleaded as separate causes of action. *Ibid.*

Evidence: Reputation: Hearsay.

7. In an action for slander evidence as to plaintiff's general reputation, in mitigation or partial denial of damages, must be con-

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fined to reputation in respect to the fault or trait of character involved in the offense charged. *Earley v. Winn*, 291

8. Where the alleged slander was to the effect that plaintiff had been "whipping her mother," evidence that prior to the slander plaintiff had a general reputation for quarreling with and ill-treating her mother was admissible on the question of damages; but evidence as to such reputation at the time of the trial was wholly inadmissible. *Ibid.*

9. Evidence in such a case of specific instances of quarrels between plaintiff and her mother at times other than that of the alleged whipping, did not tend to prove that whipping; nor was such evidence admissible to show plaintiff's reputation in that respect. *Ibid.*

10. Evidence of statements made to third persons by the mother as to plaintiff's treatment of her was hearsay and inadmissible. *Ibid.*

11. A defendant who uttered a slander upon his own authority and as of his own knowledge cannot, in order to minimize or defeat the inference of express malice, prove the unsworn statements of others or current rumors injurious to the plaintiff. *Ibid.*

Same: Cross-examination: Impeachment.

12. A witness for defendant who had testified as to what happened at the time the alleged slander was uttered, and to a subsequent conversation with certain persons, was asked on cross-examination whether he did not tell them that he knew nothing of the occurrence. *Held*, that the question was proper either as contradicting the witness or as a basis for impeaching testimony. *Ibid.*

Instructions to jury: Separate slanders.

13. In an action wherein the complaint charged at least two slanders, the court instructed the jury that if they found that defendant did not speak substantially the words alleged in the complaint he was entitled to a verdict. Plaintiff's counsel did not request any such modification or amplification of the instruction as would inform the jury that they might find a verdict for plaintiff if they found that either of the alleged slanders had been uttered. Whether, in the absence of such request, the instruction given was so clearly erroneous as to necessitate a reversal, is not determined. *Ibid.*

LICENSES.

To sell intoxicating liquors. See INTOXICATING LIQUORS.
To practice medicine. See PHYSICIANS AND SURGEONS.
License fees from public service corporations. See TAXATION, 3.

LIENS.

1. In an action to foreclose a subcontractor's lien a personal judgment against the owner is erroneous in the absence of evidence showing his personal liability to the plaintiff. *Ponti v. Eckels*, 26

2. The fact that plaintiff's attorney or some third person was unable to find in the county any agent of the owner to whom notice of the lien claim could be given in compliance with sec. 3315, Stats. 1898, does not show the plaintiff's inability to find such an agent, especially where it appears that the owner had

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an agent in the county and that plaintiff while doing the work as subcontractor had had continual dealings with said agent in his capacity as such. *Ibid.*

3. The notice of claim for a subcontractor's lien is not process, and a certificate or return signed by a deputy sheriff, to the effect that after diligent search in the county he was unable to find the owner or any agent upon whom such notice could be served, has no evidentiary force. *Ibid.*

4. Under a building contract providing that the architect might direct alterations only by making a written agreement with the contractor in advance, if no such agreement was made and there was no waiver by the contractor a subcontractor cannot recover from the contractor for extra work done without the consent or authority of the latter. *Ibid.*

LIFE ESTATES: Taxes. See INFANTS, 2.

LIFE INSURANCE. See TRUSTS AND TRUSTEES.

LIMITATION OF ACTIONS. See PHYSICIANS AND SURGEONS, 3.

LOGS AND LUMBER. See TAXATION, 13.

LOST OR DESTROYED WILL. See WILLS, 1, 2.

MALICE. See LIBEL AND SLANDER, 6, 11.

MANDAMUS.

See COURTS, 5. SCHOOLS.

Although *mandamus* will not generally be available in advance of the time when the official duty in question is to be performed, yet in extreme cases the writ may issue to control the performance of prospective duties. No other remedy being available, such a case is *held* to exist as to the duty of a county clerk with respect to printing relator's name on the official ballot, where the clerk had already made his determination and might legally act at once, but was not required by law to act until some three weeks later, only four days before the election, and the writ if delayed until that time would be fruitless. *State ex rel. Rinder v. Goff*, 668

MANSLAUGHTER. See HOMICIDE, 2, 3.

MARRIAGE. See DIVORCE.

MARRIED WOMEN.

Contracts: Validity: Enforcement.

1. A married woman, though possessing separate property, is not liable in an action at law upon a promissory note signed by her with her husband, where it was not given for the purchase price of any property bought or received by her, was not in any way necessary or beneficial to the management or enjoyment of her separate property or business, and did not relate to her personal services, and where there were no facts creating an estoppel. *Merrell v. Purdy*, 331

2. A married woman cannot be charged in an action at law upon a note signed by her with her husband as surety for his debt, where her act in becoming a party to the note was not necessary or convenient to the use and enjoyment of her separate property or to the carrying on of her separate business, and did

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not relate to her personal services. The facts that the payee changed his position (as by releasing a mortgage on the husband's chattels) on the faith of the wife's signing the note, and that the note specifically stated that she charged her separate estate with the payment thereof, are not available as grounds of liability at law. *Bailey v. Fink*, 373

3. A contract by a married daughter having separate estate and by others for the support of her mother during life, which protected such daughter from liability under the statute to furnish such support in case her mother should become unable to support herself, operated to the benefit of the daughter's separate estate, and she was therefore bound thereby. *Payne v. Payne*, 450

Liability of estate for funeral expenses.

4. Under secs. 3822, 3852, Stats. 1898, the estate of a married woman who dies leaving separate property is primarily liable for her funeral expenses; and the claim therefor may be enforced against such estate without regard to any liability of the husband. *Schneider v. Estate of Breier*, 444

5. Secs. 2341, 2342, Stats. 1898 (providing that the property of a female shall not be liable for her husband's debts), refer to debts which are exclusively debts of the husband, and not to such as are primarily a charge against the separate estate of the wife. *Ibid.*

MASTER AND SERVANT.

Inducing servant to leave: Damages. See DAMAGES, 3.

Injuries to servants.

1. In an action for injuries to an employee in a sawmill, alleged to have been caused by a piece of wood falling upon him through a hole which the employer had negligently permitted to remain in the floor above, the fact that negligence of a co-employee combined with that of the employer to cause the injury is not a defense. *Howard v. Beldenville L. Co.* 98

2. A reasonably safe working place being furnished to a servant when he is put to work, the master's absolute duty in that regard is satisfied. If thereafter the place becomes unsafe and the servant is injured by reason thereof before the master has knowledge, or reasonable opportunity to obtain knowledge, of the danger and reasonable opportunity to remove it, the master is not liable. *Ibid.*

3. The question whether plaintiff, an employee in a sawmill, was injured in the manner alleged, by his hand being caught between the belt and rim of a pulley, is *held* upon the evidence to have been one for the jury. MARSHALL, J., dissents. *Ibid.*

4. Plaintiff, an employee in defendant's shop, was injured by the falling of a crane caused by the breaking of an eyebolt by which one of the iron rods supporting the crane was fastened to the framework of the building. Findings by the jury that the construction of the rod and bolt was not reasonably safe and sufficient, and that defendant's negligence in respect to such construction was the proximate cause of the injury, are *held* to be sustained by the evidence. *Sorensen v. J. I. Case T. M. Co.* 366

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5. Defects in drilling machinery at which a boy was employed are *held* not to have been the proximate cause of an injury to his hand, such injury having been caused by his use of a wire hook invented by himself to aid in the work, and his use thereof not having been known to, or within the reasonable anticipation of, his employers. *Stefanowski v. Chain Belt Co.* 484

MAXIMS.
Expressio unius est exclusio alterius, 204, 206, 214.
Noscitur a sociis, 653–655.
Stare decisis, 217.

MECHANICS' LIENS. See LIENS.

MENTAL CAPACITY. See DEEDS, 1.

MILWAUKEE CITY CHARTER. See INTOXICATING LIQUORS, 1.

MINORS. See GUARDIAN AND WARD. INFANTS. MASTER AND SERVANT, 5. NEGLIGENCE, 5.

MISTAKE. See REFORMATION OF INSTRUMENTS.

MORTGAGES.

Power of executors, etc., to mortgage land. See WILLS, 4, 5.

Mortgaging future interests in land. See INFANTS.

Assumption of mortgage by grantee. See APPEAL, 11. CONTRIBUTION, 3.

Payment and discharge. See PRINCIPAL AND AGENT.

1. Evidence *held* to show that a note and mortgage had not in fact been paid to an agent of the holder; that the holder was not estopped to assert his rights thereunder as against the holder of a subsequent note and mortgage of the same land; and that the last named securities were void, there having been no consideration for them or for their assignment to said holder thereof. *Becker v. Bluemel,* 491

2. An insurance agent who had given a mortgage to secure repayment of advances made by the company and payable only out of renewal commissions is *held* to have been discharged from obligation upon the mortgage indebtedness when he resigned the agency. *Security T. & L. Ins. Co. v. Ellsworth,* 349

Foreclosure: Sale: Inadequate price.

3. An order confirming the sale of land upon foreclosure of a mortgage is *held* warranted by the proofs, as against the claim of the mortgagors that the price was grossly inadequate and that by false representations they were induced not to attempt to procure the attendance of bidders. *Lewis v. Priest,* 280

Same: Judgment for deficiency, when proper.

4. Where in an action to foreclose a mortgage it is adjudged that there can be no foreclosure, the personal judgment for deficiency authorized by sec. 3156, Stats. 1898, and demanded in the complaint cannot be rendered. *Marling v. Maynard,* 580

Mortgages of chattels. See CHATTEL MORTGAGES.

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MUNICIPAL CORPORATIONS.

See TOWNS.

Incorporation: City as successor of town in respect to contracts.

1. For the benefit of the inhabitants of an unincorporated village therein a town passed an ordinance granting to plaintiff's assignors a franchise for the construction of waterworks in said village and contracting to pay certain hydrant rentals, etc. The waterworks plant was constructed by plaintiff wholly within the limits of the village. Afterwards the village became incorporated as a city, and plaintiff continued to furnish water to the city and its inhabitants under the terms of the ordinance contract, all parties acting upon the assumption that the city had succeeded to all the rights and liabilities of the town thereunder. The town thereafter was not concerned in the waterworks property, exercised no supervision over it, and derived no benefit from it. *Held*, that the city was bound by the ordinance contract as the successor of the town. *Washburn W. W. Co. v. Washburn*, 73

Classification of cities: Constitutional law.

2. A statute not applicable to larger cities, but requiring in cities of the fourth class the approval of the electors by a two-thirds vote for acquiring steam or water power for light or water supply, does not involve an improper classification of cities on a basis not germane to the subject of the act. *Smith v. Burlington*, 336

Powers as to lighting plants and waterworks: Special elections.

3. Sec. 1, ch. 95, Laws of 1901, in terms grants to cities of the fourth class power to purchase, lease, or construct steam power or water power for the purpose of maintaining and operating lighting plants and waterworks. Sec. 2 provides that the power granted in sec. 1 shall be exercised only when ratified by a two-thirds vote at a special election. Construing said act in the light of other legislation on the general subject, it is *held* that, even if the power in terms granted by sec. 1 existed under prior statutes, it is subject to the condition imposed by sec. 2. *Smith v. Burlington*, 336

4. The exercise of the power mentioned is equally subject to said condition whether the attempt be to acquire the steam or water power as a separate undertaking or as incidental to or a part of a general plan for construction of a lighting plant or waterworks. *Ibid.*

Same: Injunctional order: Extent of restraint.

5. An injunctional order restraining a city of the fourth class from entering into any contract or issuing any bonds for the construction of an electric lighting plant pursuant to proceedings set forth in the complaint, which proceedings involved the acquisition of steam or water power for such plant in violation of ch. 95, Laws of 1901, is *held* not so broad as to bar the commencement of new proceedings for the establishment of a lighting system which did not include the acquisition of steam or water power. *Ibid.*

Revocation of liquor licenses. See INTOXICATING LIQUORS, 1.

Ordinances regulating street railways: Construction. See STREET RAILWAYS, 1, 2.

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Streets: Deposit of building material: Trespassers.

6. The lawful deposit of building material in a street, obstructing travel thereon to some extent, does not render others using that portion of the street trespassers, nor absolve the person depositing the material from the duty of ordinary care not to injure them. *Compty v. C. H. Starke D. & D. Co.* 622

7. A small boy who had for a short time been sitting upon building material in a street watching a pile driver on the adjoining lot was not a trespasser so as to absolve the contractor driving the piles from the duty of ordinary care toward him. *Ibid.*

MURDER. See HOMICIDE.

NAVIGABLE WATERS. See APPEAL, 3. DRAINS, 1, 2.

NECESSARIES. See HUSBAND AND WIFE.

NEGATIVE TESTIMONY. See RAILROADS, 2.

NEGLIGENCE.

Ordinary care defined: Instructions to jury.

1. A charge to the jury defining ordinary care as being such care as a person of ordinary care and prudence ordinarily *would* have exercised under the same or similar circumstances, is not erroneous by reason of the use of the word "would." *Roedler v. C., M. & St. P. R. Co.* 270

Acts constituting negligence.

2. Evidence that a pile which was being driven by defendant near a street had been broken in two or three places by the pile driver so that another blow might well cause one of the pieces to fly out of place; that such breakage was obvious to those in charge of the work; and that they caused or permitted another blow to be given, whereupon a section of the pile flew out and fell upon the plaintiff in the street, is *held* sufficient to warrant a verdict finding defendant guilty of negligence. *Compty v. C. H. Starke D. & D. Co.* 622

Proximate cause. See ELECTRICITY, 3. MASTER AND SERVANT, 4, 5.

3. A charge that by the term "proximate cause" is meant "the *efficient* cause which produces the injury as a natural and probable result," etc., is not erroneous by reason of a failure to add, after the words "efficient cause," the words "that which acts first." *Roedler v. C., M. & St. P. R. Co.* 270

Contributory negligence: Instructions to jury.

4. The use of the words "plaintiff's *fault*" in an instruction regarding contributory negligence and assumption of risk is *held* not to have been an error prejudicial to defendant, where, as used, they obviously meant merely a want of ordinary care on the part of plaintiff, of which the court had just spoken. *Sorensen v. J. I. Case T. M. Co.* 366

Same: Negligence of parent: Court and jury.

5. Upon evidence showing, among other things, that a boy about three years old had been given his lunch in the kitchen; that his mother, who earned her own living and cared for her family, then turned to her housework in another room; that during the fifteen or twenty minutes following the boy went into the back yard, thence into the street in front and around two cor-

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ners to a place about a block and a half away, where a pile driver was at work, and there was injured; and that the mother had never known the boy to go to that place before—it is *held* that the mother could not be declared, as a matter of law, to have been guilty of negligence in the care of the child. *Compty v. C. H. Starke D. & D. Co.* 622

Submission of questions to jury: Special verdict. See TRIAL, 11-13.

Injuries to employees. See MASTER AND SERVANT.

Injury from live wire. See ELECTRICITY.

Injury to person in street, from building operations on adjoining lot. See MUNICIPAL CORPORATIONS, 6, 7. NEGLIGENCE, 2.

Injury to person crossing street railway tracks. See STREET RAILWAYS, 4.

Injury to person at street crossing. See RAILROADS.

Injury in collision between street car and train. See STREET RAILWAYS, 1-3.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. FALSE PRETENSES. FORGERY.

NEW TRIAL.

It was not error not to impose costs upon setting aside a verdict and judgment for the reasons, among others, that the court committed errors upon the trial and that the verdict was perverse. *Cooper v. Granger,* 50

NOMINATIONS for office. See ELECTIONS.

NOTARY PUBLIC. See PERJURY, 1, 2.

NOTICE.
Of appeal. See APPEAL, 4.
Of payments. See BUILDING CONTRACTS, 4.
Of hearing. See DRAINS, 5.
Of existing insurance. See INSURANCE, 2.
Of lien claim. See LIENS, 2, 3.

NUNC PRO TUNC. See DIVORCE, 2.

OFFER AND ACCEPTANCE. See CONTRACTS, 1.

OFFER OF JUDGMENT. See JUDGMENT, 4.

OFFICERS.

Appointment and removal. See JUDGMENT, 5.

1. The evidence in this case—showing, among other things, that plaintiff performed the duties and was paid the salary of a policeman for a certain period; that he had theretofore, after examination by the police commission, been placed upon the eligible list; that a certificate approving his appointment, executed for the commission by its secretary, had been filed with the city clerk; and that he had duly qualified before entering the service—is *held* sufficient to show due appointment to the office of policeman. *Seifen v. Racine,* 343

2. Upon receiving notice of removal from office, believing he had been legally dicharged, a policeman delivered to the city such articles of property as it had furnished to him for use in the performance of his duties, but upon obtaining advice of counsel

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that the attempted removal was invalid he commenced proceedings to test its validity. *Held*, that he had not acquiesced in the removal or surrendered or abandoned the office. *Ibid.*

3. Shortly after an attempted removal of plaintiff from the office of policeman, other policemen were appointed, but to none of such new men were assigned the duties which plaintiff had performed, such duties being performed by an older member of the force. The salary attached to plaintiff's office was $65 per month, and the new appointees received each $55 per month. *Held*, that no other person was performing the duties and receiving the emoluments of the office to which plaintiff had title, and that for the time during which he was unlawfully prevented from performing such duties he was entitled to recover the salary of the office. *Ibid.*

Election. See ELECTIONS.

Title to office. See COURTS, 3–5.

Controlling prospective duties. See MANDAMUS.

State civil service. See CIVIL SERVICE LAWS.

County clerk. See COURTS, 5. ELECTIONS, 2. MANDAMUS.

Clerk of circuit court. See APPEAL, 4. DIVORCE, 2.

Policemen. See OFFICERS, 1–3.

Officers of corporations: Execution of notes. See BILLS AND NOTES, 1.

ORDERS.
Appealable. See APPEAL, 1–3.
Vacating. See REFERENCE, 1, 2.

ORDINANCES. See INTOXICATING LIQUORS, 1. STREET RAILWAYS, 1, 2.

PARENT AND CHILD. See DEEDS, 1, 2. GUARDIAN AND WARD. MARRIED WOMEN, 3. NEGLIGENCE, 5. WILLS, 2.

PAROL EVIDENCE. See BILLS AND NOTES, 1 (4). EVIDENCE, 4.

PARTIES.
By whom action may be maintained. See INJUNCTION, 1. SCHOOLS.
Joinder. See CONTRIBUTION, 2, 3. COSTS. PHYSICIANS AND SURGEONS, 4. PLEADING, 2.
Intervention. See REPLEVIN.

PARTNERSHIP. See CONTRACTS, 12.

PAYMENT. See BUILDING CONTRACTS, 3, 4. CANCELLATION OF INSTRUMENTS. MORTGAGES, 1, 2. PRINCIPAL AND AGENT, 6.

PERFORMANCE. See CONTRACTS, 11–14. SPECIFIC PERFORMANCE.

PERJURY.

1. The official certificate of a notary, with proof of the authenticity of his and the affiant's signatures, is *prima facie* proof of the proper execution of an affidavit; and in a prosecution for perjury based thereon evidence that the oath was never actually administered must be strong and convincing to authorize the court to take the case from the jury. *Komp v. State*, 20

2. Although, in such a case, the defendant testified positively that the notary never administered any oath, and the notary could not testify to a distinct remembrance of the exact facts of the transaction, which occurred about three years before the trial,

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the official certificate and the notary's testimony as to his practice and his recollection as aided by the document itself are *held* sufficient to sustain a conviction. *Ibid.*

3. The question being as to the truth of an affidavit that fifty per cent. of the capital stock of a trust company had been paid in in cash, evidence that the affiant, who held a large part of the stock, was in straitened circumstances at and prior to the time the stock was issued was admissible, and error in admitting such evidence before any proof as to the amount of stock held by the affiant was cured by the subsequent production of such proof. *Ibid.*

PERSONAL INJURIES. See DAMAGES, 1, 2. ELECTRICITY. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 6, 7. NEGLIGENCE. RAILROADS. STREET RAILWAYS.

PHYSICIANS AND SURGEONS.

Certificate or license to practice: Annulment.

1. Ch. 422, Laws of 1905, is so far retroactive as to authorize annulment of the certificate of a person practicing medicine after the passage of the act where he had procured such certificate by fraud or perjury or through error before such passage. *State v. Schaeffer,* 459

2. Such act, so construed, is not an *ex post facto* law, the annulment of the certificate not being in the nature of a punishment but intended only for the protection of the public against incompetency and unfitness. *Ibid.*

3. The civil action in the name of the state, authorized by ch. 422, Laws of 1905, to annul a license or certificate of registration issued to a person to practice medicine, is not an action to enforce a penalty or forfeiture; and the time for the commencement thereof is not limited by secs. 4222, 4224, 4629, or 4630, Stats. 1898. *Ibid.*

4. The fact that the complaint in such an action is signed by an attorney for the Wisconsin board of medical examiners, as well as by the district attorney, does not make such board a party plaintiff, or render the complaint demurrable on the ground of defect of parties. *Ibid.*

Competency as witnesses: Privilege. See WITNESSES, 3

PLEADING.

Liberal construction.

1. Under the rule that pleadings should be liberally construed with a view to substantial justice between the parties, no pleading is to be condemned if the allegations of fact claimed to have been stated can be read therefrom with reasonable certainty, though its allegations be in form uncertain, incomplete, and defective. *Modern Steel S. Co. v. English C. Co.* 31

Complaint or petition: Sufficiency. See COUNTY COURTS, 3. INJUNCTION, 3, 9.

Same: Bill of particulars. See GAMING, 4.

Same: Separate causes of action. See LIBEL AND SLANDER, 6.

Answer: Sufficiency. See FRAUDS, STATUTE OF, 4. JUDGMENT, 1, 2.

Same: Striking out defenses. See CHAMPERTY, 2.

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Same: Counterclaim. See BUILDING CONTRACTS, 6. JUDGMENT, 3, 4.

Same: Allegations deemed controverted.

2. Allegations of an answer that certain third persons are necessary parties are, under sec. 2667, Stats. 1898, to be deemed controverted by the plaintiff, and the issue thereon may be tried with the general issues, in the court's discretion, under Circuit Court Rule XIV. *Payne v. Payne,* 450

Reply to counterclaim: Waiver.

3. Where a trial proceeded from beginning to end upon the theory on both sides that the allegations of a counterclaim were in issue, a formal reply was waived. *My Laundry Co. v. Schmeling,* 597

Amendment of pleading. See APPEAL, 8, 9, 18. REPLEVIN.

Variance. See GAMING, 1, 4. HUSBAND AND WIFE, 4.

PLEDGES.

1. Evidence *held* to show a valid sale, by a bank through brokers, of corporate stock which had been pledged to the bank and which, at some time subsequent to the sale, came to the hands of the president of the bank. *Smith v. Becker,* 396
2. Assuming the existence of an agreement by a bank to keep separate the stock of each of three pledgors, each of whom was liable for the whole debt secured, the evidence is *held* to show that such pledgors subsequently assented to the mingling of the stock at the time of an exchange thereof for stock in a successor corporation. *Ibid.*
3. The fact that a bank sold shares of stock from a certificate which included shares pledged to the bank and shares belonging to it absolutely does not show that it sold its own shares, where it appears that it had authority to sell the pledged stock without notice, that the indebtedness secured thereby was past due, and that the proceeds of the sales were credited to the pledgor, who was notified of the sales and credits and made no objection at the time. *Ibid.*

POLICEMEN. See OFFICERS.

POSSESSION.
Of land. See LANDLORD AND TENANT, 2, 3.
Of personal property. See CHATTEL MORTGAGES, 3. CONTRACTS, 9. PLEDGES. REPLEVIN. TAXATION, 13, 15.

POWER OF ATTORNEY. See REFORMATION OF INSTRUMENTS, 2.

POWERS. See WILLS, 4, 5.

PRACTICE. See APPEAL AND ERROR. CANCELLATION OF INSTRUMENTS. CHAMPERTY. CONTEMPT. CONTRIBUTION. COSTS. COUNTY COURTS. COURTS. CRIMINAL LAW AND PRACTICE. DIVORCE. EVIDENCE. GAMING. INJUNCTION, 6. JUDGMENT. NEW TRIAL. PLEADING. PROCESS. REFERENCE. REPLEVIN. TRIAL. WITNESSES.

PRECATORY WORDS. See WILLS, 3.

PRESUMPTIONS. See APPEAL, 11. COURTS, 2. DRAINS, 7. WILLS, 1, 2.

PRIMARY ELECTIONS. See COURTS, 4, 5. ELECTIONS. MANDAMUS.

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PRINCIPAL AND AGENT.

Contracts construed: Resignation: Discharge of mortgage. See MORTGAGES, 2.

1. A note and mortgage to an insurance company, and agency contracts between the company and the mortgagor and others, all relating to the same subject matter and delivered at the same time, are construed together as one instrument. *Security T. & L. Ins. Co. v. Ellsworth,* 349

2. A written contract reciting that it was an agreement between an insurance company and one E. contained a provision to the effect that said E. and certain third persons agreed that all renewal commissions accruing under certain agency contracts with E. and said third persons should be paid to the company in liquidation of a certain note. *Held,* that the signatures of said third persons were not necessary to make the contract binding, and that the provision mentioned was in effect a promise on the part of E. that the commissions should be paid as stated. *Ibid.*

3. An agreement between an insurance company and an agent, providing that all renewal commissions accruing under certain agency contracts should be paid to the company in liquidation of a note, secured by mortgage, given by the agent for advances theretofore made to him, provided also that no call for payment of any part of the note should be made at any time in excess of the renewal commissions. Another agreement, bearing a later date, to which associate agents were also parties, provided for applying the renewal commissions to the repayment of advances thereafter to be made. Both agreements and the note and mortgage mentioned were delivered at the same time and took effect as parts of the same transaction with the consent of all parties, who obviously contemplated that the commissions would be sufficient to pay both the note and the future advances. *Held,* that the agreement of the later date did not supersede the other, and that there was no obligation to pay the note except in so far as there might be renewal commissions available for the purpose under the agreements. *Ibid.*

4. The agency contracts in such case did not provide how long they should be in force, but provided that in case of resignation of the agents the company should have authority to pay subordinate agents any commissions, etc., which the agents should have agreed to pay them. *Held,* that there was no implied covenant, arising from the existence of the note and mortgage and the agreements for repayment of advances, or otherwise, which would prevent the agents from resigning if, after fair and reasonable efforts, they were unable to conduct the business successfully. *Ibid.*

5. Having reasonably and lawfully exercised his right to resign, and having thereby ceased to be entitled to receive renewal commissions, the agent who had given the note and mortgage payable from such commissions became, by such resignation, discharged from obligation upon the mortgage indebtedness. *Ibid.*

Powers of agents: Making contracts. See CONTRACTS, 1, 2.

Same: Husband and wife: Ratification. See HUSBAND AND WIFE, 3-5.

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Same: Payments. See MORTGAGES, 1.

6. An agent for the collection of a note and mortgage cannot, unless specially authorized, take anything except money in payment. *Becker v. Bluemel,* 491

Agency of wife as to household matters: Competency as witness. See WITNESSES, 1.

Execution of note by agent of corporation: Form of signature. See BILLS AND NOTES, 1.

Service of notice on agent. See LIENS, 2, 3

Assessment of property to agent in possession. See TAXATION, 13, 15.

PRINCIPAL AND SURETY. See FRAUDS, STATUTE OF.

PRIVACY, RIGHT OF. See CONTRACTS, 10.

PRIVILEGED COMMUNICATIONS. See WITNESSES, 2, 3.

PROCESS.

Notice of lien claim is not process: Proof of service. See LIENS, 3.

Service by publication: Time of making order.

An order for service by publication, under sec. 2640, Stats. 1898, made four days after the making of the affidavit therefor and three days after a return of the sheriff that defendant could not be found, is *held* to have followed such affidavit "within a reasonable time" and to be valid. *Zahorka v. Geith,* 498

Same: Proof of mailing. See DIVORCE, 1.

PROMISSORY NOTES. See BILLS AND NOTES.

PROOF OF SERVICE. See LIENS, 3. DIVORCE, 1.

PROXIMATE CAUSE. See ELECTRICITY, 3. MASTER AND SERVANT, 4, 5. NEGLIGENCE, 3. TRIAL, 12.

PUBLICATION: Service by. See PROCESS.

PUBLIC POLICY. See CONTRACTS, 3–7.

PUBLIC SCHOOLS. See SCHOOLS.

PUBLIC SERVICE CORPORATIONS. See GAS.

QUIETING TITLE. See TAX TITLES, 2.

RAILROADS.

Taxation. See TAXATION, 3.

Negligence: Injury to pedestrian at street crossing.

1. Whether in this case the plaintiff, who was struck at night by a train at a street crossing, was guilty of contributory negligence in failing to see the headlight of the train as it approached, is *held,* upon the evidence, to have been a question for the jury. *Roedler v. C., M. & St. P. R. Co.* 270

2. Refusal to give a specific instruction that plaintiff's testimony that the bell and whistle on engine were not sounded was negative and not entitled to the same weight as the testimony of defendant's witnesses, is *held* not error in view of the general charge. *Ibid.*

RATIFICATION. See CHAMPERTY, 3. HUSBAND AND WIFE, 2–5.

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REAL PROPERTY. See APPEAL, 11, 18. BOUNDARIES. CANCELLATION OF INSTRUMENTS. CHAMPERTY. DEEDS. DRAINS. INDIANS. INFANTS. LANDLORD AND TENANT. LIENS. MORTGAGES. SPECIFIC PERFORMANCE. TAXATION, 8–10. TAX TITLES. WILLS, 3–5.

REASONABLE DOUBT. See BASTARDY, 1.

RE-ASSESSMENT. See TAXATION, 14, 15.

REBUTTAL. See TRIAL, 1.

RECORDING of order, etc. See DRAINS, 9.

REFERENCE.

1. The denial of a motion to vacate an order of reference because of prejudice of the referee, if error, was not harmful where the referee afterwards resigned and another was appointed. *My Laundry Co. v. Schmeling*, 597
2. The rule that, except as provided in sec. 2832 or sec. 2879, Stats. 1898, a judgment or final order cannot be vacated by the court entering it after the term of entry, does not preclude the appointment at any time of a new referee in place of one who has resigned and the vacation of the order appointing the first referee. *Ibid.*
3. Where without objection a referee heard together two matters in the same action which had been referred to him, and no exception to his report on that ground was made in the trial court, the refusal to set aside the report will not be held erroneous on that ground. *Ibid.*

REFORMATION OF INSTRUMENTS.

1. A contract will not be reformed on the ground of mistake unless there was some definite agreement which by mutual mistake was omitted from or wrongfully stated in the written contract. *Auer v. Mathews*, 143
2. Where, without fraud or mistake of fact, the owner of chattels executed a bill of sale transferring the title to another person, with the intention merely to empower the latter to pack and ship them, the court cannot set aside the instrument or convert it into a power of attorney merely because such person did not carry out the trust, although it may, under proper pleadings, enforce the trust. *Hurley v. Walter*, 508

REMEDIES. See CONTRACTS, 13, 14. INJUNCTION. MANDAMUS. SCHOOLS. SPECIFIC PERFORMANCE.

REMOVAL from office. See OFFICERS, 2, 3.

RENT. See LANDLORD AND TENANT, 2, 3.

REPLEVIN.

Equitable issues: Right to jury trial: Waiver.

1. Interveners in replevin claimed title under a bill of sale from plaintiff, and on their motion the court directed the complaint to be amended so as to make them defendants and charge them with setting up such claim. The amended complaint further alleged facts to show the alleged bill of sale invalid, and asked that it be set aside and plaintiff's title established. The inter-

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veners answered on the merits. *Held*, that the issues thus framed were equitable and that the interveners had waived any right which they might have had to a jury trial under sec. 2843, Stats. 1898. *Hurley v. Walter*, 508

Same: Amendment of pleading after reversal.

2. In replevin, an amended complaint having asked that a bill of sale under which an intervener claimed title be set aside as fraudulent, the supreme court, on reversing a judgment for plaintiff on the ground that no fraud was proved, nevertheless authorizes the trial court to allow the complaint to be amended so as to raise the question whether the title had been placed in said vendee merely in trust. *Ibid.*

Same: Costs. See COSTS, 3.

REPLY to counterclaim: Waiver. See PLEADING, 3.

RES GESTÆ. See APPEAL, 10. CRIMINAL LAW, 1. EVIDENCE, 2.

RESIGNATION of agent. See MORTGAGES, 2. PRINCIPAL AND AGENT, 4, 5.

RES JUDICATA. See JUDGMENT, 5. TAX TITLES, 2.

RESTRAINT OF TRADE OR LABOR. See CONTRACTS, 3–7. INJUNCTION, 3–8.

REVOCATION of will. See WILLS, 1, 2.

RIVERS. See APPEAL, 3. DRAINS, 1, 2.

ROADS AND STREETS. See BOUNDARIES. CONTRACTS, 14. DRAINS, 7. MUNICIPAL CORPORATIONS, 6, 7.

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SALES FOR TAXES. See TAX TITLES.

SCHOOLS.

Illegal change in text books: Remedies.

1. If a school board makes an illegal change in text books, *mandamus* will lie to compel recognition of the right of pupils to use the books illegally discarded. *Harley v. Lindemann*, 514
2. An injunction should not be granted at the suit of a parent of school children to prevent a threatened illegal change in text books, since if such change be made it will work no irreparable injury and the remedy by *mandamus* will be adequate. *Ibid.*

SERVICE.
Of notice of appeal. See APPEAL, 4.
Of notice of lien claim: Proof. See LIENS, 2, 3.
Of process by publication. See PROCESS.

SIGNATURE. See BILLS AND NOTES, 1.

SLANDER. See LIBEL AND SLANDER.

SPECIAL ASSESSMENTS. See DRAINS, 6–9.

SPECIAL VERDICT. See TRIAL, 6, 9–14.

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SPECIFIC PERFORMANCE.

1. To be specifically enforced, a contract must be definite and certain in its terms, or capable of being made definite by the aid of legal presumptions or by evidence of contemporaneous facts and circumstances which is properly admissible. *Auer v. Mathews*, 143

2. A contract to convey "forty-seven descriptions located in" certain sections in two certain towns, "and containing not less than 1,700 and no more than 2,000 acres,"—there being no agreement as to what particular tracts, out of fifty-seven descriptions considered by the parties, should be conveyed,—is too indefinite to be specifically enforced. *Ibid.*

STATE BOARD OF MEDICAL EXAMINERS. See PHYSICIANS AND SURGEONS, 4.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See PHYSICIANS AND SURGEONS, 3.

STATUTES.

Enactment: Vote required: Creation of banking department. See CIVIL SERVICE LAWS.

Repeal: General and specific statutes. See TAXATION, 6.

1. A statute directed towards a special subject is ordinarily preponderant over a later and more general statute; but when the earlier statute is special only in the sense that it applies to a single case, of which there are many in the state, and the later statute is general in its operation and applies to all such cases, then the earlier one is deemed to be superseded by the later and, so far as inconsistent, to be repealed. *Gymnastic Asso. v. Milwaukee*, 429

Constitutionality. See CONSTITUTIONAL LAW.

Construction. See APPEAL, 2–4, 12, 20. BILLS AND NOTES, 1. CHATTEL MORTGAGES, 2, 3. CONSTITUTIONAL LAW, 1. CONTEMPT, 2, 4. COURTS, 1. DRAINS. ELECTIONS. FALSE PRETENSES, 1. FRAUDS, STATUTE OF. HOMICIDE. INDIANS. INFANTS. INTOXICATING LIQUORS, 1, 4. MARRIED WOMEN. MORTGAGES, 4. MUNICIPAL CORPORATIONS, 3, 4. PHYSICIANS AND SURGEONS, 1–3. PLEADING, 2. PROCESS. TAXATION, 1–10, 13–15, 19. TOWNS. TRIAL, 9. WILLS, 1, 2.

2. The rule, *expressio unius est exclusio alterius*, like all other mere rules of construction applied to ambiguous words, yields to proof of facts and circumstances which satisfactorily demonstrates that the meaning intended was different. *Nunnemacher v. State*, 190

3. Where the words of a statute are plain and unambiguous and not absurd, courts must be guided thereby, and not by extrinsic facts and circumstances, in ascertaining the legislative intention. *Smith v. Burlington*, 336

Effect on pending proceedings: Appealable orders. See APPEAL, 1.

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STREET RAILWAYS.

Negligence in crossing steam railroad: Ordinances: Injury to passenger.

1. In an action against a street railway company for injuries sustained by a passenger in a collision with a train at a railroad crossing, the evidence is *held* to show, as matter of law, compliance with a municipal ordinance which made it the duty of the motorman to stop the car at least twenty feet from the railroad crossing and of the conductor to pass in front of the car a sufficient distance to enable him to ascertain whether there was any danger in sight before the car was again placed in motion. *Bartholomaus v. Milwaukee E. R. & L. Co.* 388

2. Where a distance of only about eighty-five feet intervened between the tracks of different railroads crossed by street railway tracks, the ordinance did not require that a street car,

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which had stopped before crossing the track of the first railroad, should again stop before crossing the tracks of the second. *Ibid.*

3. The results of calculations based upon statements of witnesses as to the speed of the railroad train, etc., do not constitute established physical facts such as would raise a conflict of evidence and make the question of negligence on the part of the conductor and motorman one for the jury, as against the uncontradicted positive testimony showing that they were not negligent in attempting to cross the tracks. *Ibid.*

Injury to person crossing tracks: Contributory negligence.

4. Plaintiff, who was injured while attempting to cross a street railway track after alighting from a car on a parallel track, is *held* to have been guilty of contributory negligence as matter of law in failing to look when he might have seen and avoided the car by which he was struck. *Morice v. Milwaukee E. R. & L. Co.* 529

STREETS. See BOUNDARIES. CONTRACTS, 14. MUNICIPAL CORPORATIONS, 6, 7.

SUBCONTRACTORS. See BUILDING CONTRACTS. LIENS

SUMMONS: Service by publication, etc. See DIVORCE, 1. PROCESS.

SUPREME COURT. See APPEAL AND ERROR. COURTS, 3–5. CRIMINAL LAW, 4.

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SURRENDER.
Of mortgaged chattels. See CHATTEL MORTGAGES, 3.
Of lease. See LANDLORD AND TENANT, 3.
Of office. See OFFICERS, 2.

TAXATION.

Constitutional requirements and restrictions: Excise taxes. See CONSTITUTIONAL LAW, 2, 3. TAXATION, 16–18.

1. Sec. 1, art. VIII, Const. (providing that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe"), does not by implied exclusion limit taxation to property taxation or prohibit the levying of excise taxes. *Nunnemacher v. State,* 190

2. The proceedings of the constitutional convention, the decisions of this court, and the practical construction given to the taxing power of the government for more than fifty years concur to show that such power is not limited to property alone. *Ibid.*

3. Taxation of railroads under ch. 74, Laws of 1854, and under the license system in use from 1860 to 1903, was not taxation of property within the meaning of sec. 1, art. VIII, Const., but was excise taxation upon the privilege of transacting business. So, also, the license fees exacted from other public service corporations whose property is exempted from taxation, and from domestic insurance companies, are privilege or occupation taxes. *Ibid.*

4. The clause in sec. 1, art. VIII, Const., "the rule of taxation shall be uniform," if applicable to excise taxation at all, means no more than the general equality clauses of the state constitution or the guaranty of "the equal protection of the laws" in the

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XIVth amendment to the federal constitution. It means only that such taxation shall not unjustly discriminate, but shall operate alike upon all persons similarly situated. *Ibid.*

5. Sec. 5, art. VIII, Const. (relating to the levy of an annual tax by the legislature), is intended merely as a regulation or provision covering the levy of a direct tax upon property, if such a tax be necessary, and does not apply to excise taxation. *Ibid.*

Exemptions: Property of Turner societies: "Used exclusively for educational purposes."

6. Ch. 44, P. & L. Laws of 1869, incorporating the plaintiff Turner society and exempting all its property from taxation, was superseded and repealed, as to such exemption, by ch. 309, Laws of 1883 (subd. 23, sec. 1038, Stats. 1898), providing that all the "property of the Turner societies which are or may be incorporated under the laws of this state, which is used exclusively for educational purposes, is hereby exempted from taxation." *Gymnastic Asso. v. Milwaukee,* 429

7. Under a statute limiting exemptions to property "used exclusively for" a specified purpose, a devotion of the income of the property to such purpose is not sufficient, but there must be primary physical use therefor of the very property for which exemption is claimed. *Ibid.*

8. Thus, where portions of a building owned by a Turner society were leased for a saloon and a barbershop, the building was not "used exclusively for educational purposes," within the meaning of subd. 23, sec. 1038, Stats. 1898, even though the rentals received were used by the society for such purposes. *Ibid.*

9. Under said statute the whole of an indivisible building, and the ground on which it stands, is subject to taxation unless the whole is rendered exempt by being used exclusively for educational purposes. *Ibid.*

[10. Whether a mere incidental use promotive of the main purpose (as the letting of a hall for lectures when not required for the uses of the society owning it, or the use of parts of a building for living rooms for teachers or janitors) would destroy the exemption, not determined.] *Ibid.*

Exemption of small estates from inheritance taxes. See TAXATION, 18.

Assessment: Board of review: Judicial review of its action.

11. Judicial review of the action of a board of review in increasing an assessment extends only to the correction of jurisdictional errors, not mere errors of judgment as to the preponderance of the evidence. *State ex rel. Edward Hines L. Co. v. Fisher,* 57

12. Where the board of review had jurisdiction of the subject matter of increasing an assessment, and in making the increase acted upon evidence which, in any reasonable view thereof, justified its decision, it did not commit any jurisdictional error. *Ibid.*

Same: Property in possession of agent.

13. In this case the decision of the board of review, in increasing the amount assessed to a corporation upon logs and lumber, is *held* to be warranted by evidence as to their value and showing that portions of the lumber, claimed to have been sold prior to May 1, remained in possession of the corporation as agent and were therefore assessable to it under sec. 1044, Stats. 1898. *Ibid.*

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Re-assessment, when authorized: Agents.

14. Sec. 1059, Stats. 1898, as amended by ch. 50, Laws of 1899, does not authorize re-assessment, in a subsequent year, of property which was assessed and entered upon the tax roll for the year in which it should have been taxed, and where such prior assessment has been set aside or determined to be illegal and void. *Ashland Co. v. Knight,* 63

15. Personal property cannot lawfully be re-assessed to an agent to whom it never belonged and who is not in possession of it at the time of the attempted re-assessment. *Ibid.*

Sales for taxes. See TAX TITLES.

Inheritance taxes. See CONSTITUTIONAL LAW, 2, 3.

16. Inheritance or succession taxes may be levied by the legislature in the exercise of the power of reasonable regulation and taxation of transfers of property. *Nunnemacher v. State,* 190

17. Inheritance taxes are not taxes upon property, but upon the right to receive property. *Ibid.*

18. Classification between lineal and collateral relatives and strangers, with different rates, and a reasonable exemption of small estates, as provided for in the inheritance tax law of 1903 (ch. 44), do not violate the rule of uniformity or the principle of the equal protection of the laws; nor does the progressive feature of the act, by which increased rates are imposed as the amount of the bequest or inheritance increases. *Ibid.*

Same: Valuation of estates: Compelling corporation to produce books.

19. Ch. 44, Laws of 1903, imposing a tax upon inheritances and authorizing the county court, with or without the appointment of an appraiser, to ascertain and determine the value of the estate, and for that purpose to compel the attendance of witnesses, etc., does not empower the court to compel a corporation in which the decedent was a stockholder to produce its private books and papers in court to aid in determining the value of the stock so held. *State ex rel. Pabst B. Co. v. Carpenter,* 180

TAXES.

Agreement to pay: Construction. See DEEDS, 3.

Mortgaging future estate to pay delinquent taxes. See INFANTS, 2.

TAX TITLES.

See CHAMPERTY.

1. Where the grantee in a tax deed secures a second deed on a tax certificate issued prior to his first deed but based on taxes subsequent to those on which his first deed is based, the second deed does not cut off and extinguish his title and interest under the first; and one to whom said grantee afterwards conveys the land may claim title under said first tax deed. *Patterson v. Cappon,* 439

2. In an action to quiet title, brought by one claiming under a tax deed, defendant tendered the defense to the original owners at the time the taxes were levied, who had warranted the title, but they neglected to defend. Plaintiff had judgment, and defendant then brought action against said original owners for breach of the covenant of warranty. *Held,* that the judgment quieting title was conclusive in the later action as against the claim of said covenantors that the purchase at the tax sale was for the benefit of the covenantee. *Ibid.*

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TERMS.
Of court. See COURTS, 1, 2.
Of granting new trial. See NEW TRIAL.

TEXT BOOKS: Illegal change. See SCHOOLS.

TIMBER. See INDIANS.

TITLE.
To land. See APPEAL, 18. BOUNDARIES. CANCELLATION OF INSTRUMENTS. CHAMPERTY. DEEDS. INDIANS. INFANTS. INJUNCTION, 2. MORTGAGES. SPECIFIC PERFORMANCE. TAX TITLES. WILLS, 3–5.
To personal property. See CHATTEL MORTGAGES. CONTRACTS, 9. DEEDS. PLEDGES. REFORMATION OF INSTRUMENTS. REPLEVIN. TAXATION, 13, 15. TRUSTS.

TORTS. See DAMAGES, 1, 2. ELECTRICITY. LIBEL AND SLANDER. MASTER AND SERVANT. NEGLIGENCE. RAILROADS. REPLEVIN. STREET RAILWAYS.

TOWNS.

Organization: Discretion of circuit court. See CONSTITUTIONAL LAW, 1.

City as successor of town: Contract for water service, etc. See MUNICIPAL CORPORATIONS, 1.

Contracts: Employment of attorney by the year.
The general provision in sec. 773, Stats. 1898, authorizing a town "to make all contracts necessary and convenient for the exercise of its corporate powers," does not authorize the employment of an attorney by the year, thus in effect creating and filling the office of town attorney,—since the specific provision of sec. 776 relating to the employment of attorneys shows clearly the legislative purpose that attorneys should be employed only for specific actions pending or about to be instituted. *State ex rel. Thompson v. Welbes,* 639

Town drains. See DRAINS, 3–9.

TRESPASS. See MUNICIPAL CORPORATIONS, 6, 7.

TRIAL.

Issues tried together: Discretion. See PLEADING, 2.

Examination of jurors. See JURY.

Order of proof: Rebuttal: Discretion.
1. The trial court has a wide discretion as to whether, after both parties have rested their cases in chief, further evidence shall be confined to such as is strictly rebuttal. *Howard v. Beldenville L. Co.* 98

Examination of witnesses by court. See CRIMINAL LAW, 3.

Arguments and conduct of counsel. See CONTRACTS, 17.

Taking case or question from jury. See BILLS AND NOTES, 2. CONTRACTS, 5. INSURANCE, 2, 3. LIBEL AND SLANDER, 5. MASTER AND SERVANT, 3. NEGLIGENCE, 5. PERJURY, 1, 2. RAILROADS, 1. STREET RAILWAYS, 3, 4.
2. When the facts in a case, though undisputed, are ambiguous and of such a nature that reasonable men, unaffected by bias or prejudice, may disagree as to the inference or conclusion to be drawn from them, the case should be submitted to the jury. *Roedler v. C., M. & St. P. R. Co.* 270

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3. An unqualified admission of a party against his interest does not preclude sending the issue involved to the jury where there is credible evidence fairly conflicting therewith. *Bruger v. Princeton & St. M. Mut. F. Ins. Co.* 281

4. The terms of a contract for support not being in dispute, its construction was for the court, not for the jury. *Payne v. Payne.* 450

Instructions to jury. See DAMAGES, 2. LIBEL AND SLANDER, 13. NEGLIGENCE, 1, 3, 4. RAILROADS, 2.

5. Failure to instruct the jury as to the meaning of the term "burden of proof" is not error where there was no request for such instruction. *Howard v. Beldenville L. Co.* 98

6. Where a case is submitted for a special verdict it is error to give general instructions. *Ibid.*

7. In the assessment of damages for future suffering, mental and physical, the jury should be limited by the instructions to such loss in that regard as the evidence satisfies them will be reasonably certain to result from the injury. *Ibid.*

8. An instruction carrying the impression to the jury that, in the opinion of the judge, there was evidence from which the jury might find a certain fact, when in reality there was no evidence whatever tending to prove that fact, was misleading and erroneous. *Speliopoulos v. Schick,* 556

Special verdict. See APPEAL, 13.

9. Under sec. 2858, Stats. 1898, the court may submit the case for special verdict without request of counsel. *Howard v. Beldenville L. Co.* 98

10. A special verdict should be composed only of a sufficient number of questions to cover singly the material issues controverted on the evidence, and should be so worded that each question, so far as practicable, shall be susceptible of affirmative or negative answer. *Ibid.*

11. The submission of the general question "Was the defendant guilty of negligence which caused plaintiff's injury?" is criticised as involving several questions, which should have been separately submitted, as to the existence of the alleged defect and as to whether defendant had known or been chargeable with knowledge thereof for such a length of time that failure to repair it before the accident was negligence. *Ibid.*

12. The submission of four questions as to proximate cause is also criticised on the ground that one, properly worded, would have sufficed, and also because said questions included immaterial matters and matters not in issue and were so framed as to cross-question the jury. *Ibid.*

13. A general question in the special verdict as to whether plaintiff was guilty of contributory negligence is *held* sufficiently to have covered the question of his assumption of the risk, in the absence of any request for a specific submission of that matter. *Ibid.*

14. A question for special verdict, asking what was the real value of support furnished to a person over and above the value of her services in the household, covered but one issuable fact and was not objectionable. *Payne v. Payne,* 450

Judgment. See JUDGMENT.

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TRUSTS AND TRUSTEES.

See CONTRACTS, 9. REFORMATION OF INSTRUMENTS. REPLEVIN, 2. WILLS, 3–5.

To establish an oral agreement to hold in trust, in whole or in part, for the benefit of the wife of the assured a life insurance policy payable to the alleged trustee, the proof must be clear and convincing, and the loose and vague recollections of witnesses as to a conversation with such alleged trustee are not sufficient. *Dewey v. Fleischer*, 591

TURNER SOCIETIES: Exemption of property. See TAXATION, 6–10.

UNDERTAKING on appeal from county court. See APPEAL, 20.

UNDUE INFLUENCE. See DEEDS, 1, 2.

VACATING judgment or order. See JUDGMENT, 1, 2. REFERENCE, 2.

VALUE of property destroyed. See INSURANCE, 3, 4.

VARIANCE. See APPEAL, 8, 9. GAMING, 1, 4. HUSBAND AND WIFE, 4.

VENDOR AND PURCHASER OF LAND. See APPEAL, 11. BOUNDARIES. CANCELLATION OF INSTRUMENTS. CHAMPERTY. DEEDS. INDIANS. SPECIFIC PERFORMANCE.

VERDICT. See APPEAL, 13. TRIAL, 9–14.

VILLAGES. See MUNICIPAL CORPORATIONS, 1.

VOIR DIRE. See JURY.

WAIVER.
Of variance. See APPEAL, 8, 9. GAMING, 1, 4.
Of claim for damages. See BUILDING CONTRACTS, 1, 3.
Of error in admission of evidence. See INTOXICATING LIQUORS, 3.
Of reply to counterclaim. See PLEADING, 3.
Of objection to hearing matters together. See REFERENCE, 3.
Of right to jury trial. See REPLEVIN, 1.

WATERS.
Navigable rivers and lakes. See APPEAL, 3. DRAINS, 1, 2.
Town drains. See DRAINS, 3–9.
Water supply: Contracts. See MUNICIPAL CORPORATIONS, 1.

WILLS.

Right to transmit property by will. See CONSTITUTIONAL LAW, 3.

Lost or destroyed wills: Revocation: Presumption.

1. Under sec. 3791, Stats. 1898 (providing for the establishment of any will which shall be lost or destroyed by accident or design), if a reasonable time elapsed after testator's knowledge of the destruction of a will and before his death, and he had opportunity to reproduce it but did not do so, a presumption of revocation arises and the will cannot be admitted to probate. *Parsons v. Balson*, 311
2. Where a will was accidentally destroyed three years before the testator's death, with his knowledge, and he afterwards adopted a child, but did not reproduce said will or make a new one, it is *held* that the destroyed will was revoked. *Ibid.*

Probate: Vacating order. See APPEAL, 18, 19. COUNTY COURTS, 2, 3.

Construction: Trusts: Precatory words.

3. A testator devised land to his wife, subject to the payment of certain legacies, and also devised and bequeathed to her all the

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residue of his estate, "to have and to hold the same unto her forever." The will then proceeded as follows: "It is my wish that my said wife . . . will so arrange her affairs that whatever property may be left at her death the same will be divided as near equally as possible between my said daughters." *Held*, that these precatory words were advisory only and did not create any trust, and that, subject to the payment of debts, legacies, and expenses, the will gave the property mentioned to the widow absolutely. *Conlin v. Sowards*, 320

Same: Powers: Mortgaging land. See INFANTS, 1.

4. Where power given by a will to sell and convey land is coupled with charges upon the estate and the executors are intrusted with its management to carry out and discharge such obligations, the extent of the power conferred (and whether it includes the power to mortgage the land) is to be ascertained from the intention of the testator as evinced by the will in the light of surrounding circumstances. *Lueft v. Lueft*, 534

5. A will giving to executors power "to hold, manage, invest," etc., and "to lease, sell, deliver, transfer, grant, and convey . . . and generally to have, manage, and control" the estate as fully as the testator might do if living, is *held* to authorize the mortgaging of land to enable the executors to carry out the purposes of the testator. *Ibid.*

WISCONSIN STATE BOARD OF MEDICAL EXAMINERS. See PHYSICIANS AND SURGEONS, 4.

WITNESSES.

Competency: Husband and wife.

1. The fact that plaintiff's wife, in the usual course of the management of the household affairs, attended to the details of procuring provisions, etc., and performed the labor incident to furnishing support for a person in their house, did not show that she was the agent of her husband in the matter of such support so as to make her a competent witness for the defense in an action by the husband to enforce contribution from other persons jointly bound with him to furnish such support. *Payne v. Payne*, 450

Same: Attorneys: Physicians: Privileged communications.

2. An attorney at law who drew a deed and a contract by the grantee to support the grantor, and who, at the grantor's request, signed such papers as a witness, was properly allowed to testify as to the mental competency of the grantor at that time. *Boyle v. Robinson*, 567

3. A physician who signed a deed as a witness is competent to testify as to the mental competency of the grantor, where his testimony does not involve disclosure of any communications received by him while attending the grantor as a physician. *Ibid.*

Examination and cross-examination. See CRIMINAL LAW, 3. LIBEL AND SLANDER, 12.

4. The extent to which cross-examination of witnesses may go is a matter peculiarly within the discretion of the trial court. *Earley v. Winn*, 291

Credibility. See INTOXICATING LIQUORS, 3.

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Impeachment. See LIBEL AND SLANDER, 12.
5. A witness cannot be impeached by proof that he has made statements contradictory to his testimony, unless such statements are material to the controversy. *Earley v. Winn,* 291
WORDS AND PHRASES.
Become due immediately, in note. See BILLS AND NOTES, 3.
Corner of lot, in deed. See BOUNDARIES, 2.
Debt of another, in statute. See FRAUDS, STATUTE OF, 2.
Depraved mind, regardless of human life, in statute. See HOMICIDE, 1.
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